

1063
No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and
E. H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MATT I. SULLIVAN,

THEO. J. ROCHE,

Special Assistants to the Attorney General.

Filed
Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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LAW OF THE CASE

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BRIEF FOR DEFENDANT IN ERROR.

On December 12, 1902, at San Francisco, California, the corporation known as the Western Fuel Company was incorporated (pp. 25-62). Shortly after its organization, it engaged in, and has ever since carried on the business of mining, importing, buying, selling, handling and dealing in fuel coals. The major portion of its business has always consisted in dealing in and handling foreign coals, most of which was mined by it at its coal mines located in and near Nanaimo, British Columbia, the remainder being acquired by purchase.

Nearly all of these foreign coals were imported into the United States at the harbor of San Fran-

cisco, and discharged either at San Francisco or at Oakland; upon infrequent occasions a cargo would be discharged at San Diego, and in one or two instances, at other ports located within the State of California.

INDICTMENT.

On February 27, 1913, the Federal Grand Jury, holding its session at San Francisco, returned an indictment against John L. Howard, James B. Smith, J. L. Schmitt, Robert Bruce, F. C. Mills, E. H. Mayer, Sidney V. Smith and Edward J. Smith, in which the individuals named were charged with having engaged in a conspiracy in the guise, and under the name, and through the medium of the Western Fuel Company, a corporation, for the purpose of defrauding the United States out of import duties on coal imported into the United States from foreign countries by said Western Fuel Company and others, to be accomplished:

1st. By fraudulent weights and false and fraudulent returns of weights.

2nd. By fraudulently weighing and causing to be weighed and reported to the United States, false weights on coal loaded from bunkers and barges of the Western Fuel Company, for fuel purposes, into American registered vessels plying between the United States and foreign countries.

3rd. By making, and causing to be made, false returns of weights and entries of coal shipped and

loaded aboard transports of the United States army service and other Government vessels.

In order to carry out such conspiracy, it was alleged that the defendants maintained on docks, wharves and barges owned by the Western Fuel Company, certain scales and weights which were fraudulently manipulated by them so that they would record weights of coal as desired by the defendants, but which were not the true weights thereof; that defendants pursued a method of weighing so that such scales recorded the weights desired by defendants, but not the true weights; that certain fraudulent affidavits and statements were made by defendants to officers of the United States and others and the Pacific Mail Steamship Company, a corporation, operating vessels registered under the United States laws, engaged in foreign trade and buying coal from said Western Fuel Company, for fuel purposes, to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties than the true weight thereof would permit, or what was actually due; and that defendants caused coal to be incorrectly weighed and measured on said scales for the purpose of permitting said Western Fuel Company to receive and make fraudulent profits and gains. It was further alleged that such conspiracy was in effect, operation and process of execution from January 1, 1904, to February 24, 1913 (pp. 5-16).

To this indictment, each of the defendants pleaded not guilty (p. 16). Thereafter a trial was had which commenced on December 9, 1913, and terminated shortly after midnight of February 17, 1914, at which time the verdict of the jury was returned.

RESULT OF TRIAL.

During the trial, the defendant, John L. Howard, died. The defendants, Joseph L. Schmitt, Robert Bruce and Sydney V. Smith were acquitted by the jury as the result of instructions given to it by the court. A verdict of not guilty was rendered as to defendant E. J. Smith. A verdict of guilty as charged was returned by the jury against the defendants, James B. Smith, F. H. Mills and Edward H. Mayer.

A motion for new trial made by the three defendants last named, having been denied, the defendant James B. Smith was ordered imprisoned in the penitentiary at San Quentin for the term of eighteen months and fined \$5,000; the defendant, F. C. Mills, was ordered imprisoned at the same penitentiary for the same period of time; and the defendant, E. H. Mayer was ordered imprisoned in the county jail at Alameda for the term of one year (Record, pp. 2503-6). From this judgment, the convicted defendants have prosecuted a writ of error to this court.

CLAIM OF GOVERNMENT.

The business carried on by the Western Fuel Company between January 1, 1906, and the date upon which the indictment above referred to was returned, was very extensive. In fact, so far as San Francisco and its vicinity was concerned, it practically enjoyed a monopoly. This is made clear by the testimony of D. C. Norcross, the secretary of the Western Fuel Company, who testified:

“During the year 1912 the following coal companies, in addition to the Western Fuel Company, were importers of coal in San Francisco: Hind, Rolph & Co., J. J. Moore & Co., Mitsue & Company and G. W. McNear. These companies simply purchased coal and brought it into the port here and sold it in cargo. Ordinarily they sold these cargoes to the Western Fuel Company. The Pacific Fuel Company in 1912 was selling imported coal to the dealers. It was the only company in San Francisco selling foreign coal to dealers outside of the Western Fuel Company in 1912 that I can think of. The volume of business done by the Pacific Fuel Company in imported coal is small in comparison with that done by the Western Fuel Company” (p. 182).

and other evidence with which the record is replete showing that nearly all foreign coal was discharged by this company.

A large part of the business transacted by the Western Fuel Company consisted of supplying to vessels plying between San Francisco and other ports, coal for fuel purposes. Among the vessels thus supplied with coal by the Western Fuel Company were liners carrying the American flag, plying

between San Francisco and foreign ports. For each ton of foreign coal upon which duty had been paid, delivered to these last mentioned vessels for fuel purposes, the company owning such vessel was entitled, upon furnishing to the government the necessary proofs, to a refund of the duty thus paid. During this same period of time the Western Fuel Company also supplied to the United States army transports and other Government boats large quantities of coal. The coal delivered to all vessels, both privately owned and belonging to the United States, would be weighed at the point of delivery to the vessel and, as the evidence disclosed, the drawback claims upon which such duties would be refunded by the Government, were based upon the records of such weights, upon which records would also be predicated and paid the bills presented for coal supplied to Government boats. And, while the Government is not interested in this phase of the situation, it may be proper in this connection to state that the companies owning the vessels coaled by the Western Fuel Company were required to and did pay for such coal upon the same weights as were made the basis of the drawback claims.

It is contended by the Government that large quantities of foreign coal were discharged at the wharves and bunkers of the Western Fuel Company upon which no duty was paid, and that to this extent the Government was defrauded out of moneys to which it was entitled, representing duties which should have been paid upon coal not weighed,

or incorrectly weighed. It also contends that in supplying coal for fuel purposes to vessels registered under the American flag, engaged in foreign trade, large quantities of coal were claimed to have been delivered to these vessels in excess of its actual weight, thereby defrauding the Government out of moneys refunded by it, supposed to represent duties paid upon this coal, to the extent to which the weights charged exceeded the true weights. It is further contended that large quantities of coal were claimed to have been supplied to transports and other Government boats in excess of its true weight, thereby defrauding the Government out of the price paid by it for coal not delivered, and in excess of its true weight.

That a conspiracy was entered into by the defendants for the purpose of perpetrating these frauds, and that the frauds were in fact committed, was absolutely demonstrated to a mathematical certainty by the evidence introduced.

At the threshold of this case, it may seem singular that this large corporation would engage in a conspiracy having for its purpose only the accomplishment of frauds against the United States Government, involving duties, drawbacks, and the price paid for coal furnished to Government vessels, in excess of the true weights. This, however, was but a small part of what was intended to be and what was in fact accomplished by the conspiracy and the fraudulent conduct resulting therefrom. When boats were chartered by the Western

Fuel Company to import coal into the United States (excepting when hired by the month), the charter price was paid, not upon the invoice or bill of lading weight, but upon the outturn weight (p. 182). When foreign coal was purchased by the Western Fuel Company from consignees by whom it was imported, the price paid to them for the coal was likewise paid upon the outturn, or discharge weight. When coal would be furnished to vessels for fuel purposes, the charges made and the prices paid therefor would be based upon the alleged weight of the coal at the point of delivery into the vessel, and when coal would be supplied to United States transports and other Government boats, the same method of charging would be pursued. While the Government may have been interested only to a limited extent in these fraudulent practices, the ultimate and final profit derived therefrom by the Western Fuel Company was tremendous. The extent to which it was assisted financially, and the profits resulting therefrom, can readily be imagined from the dividends paid from time to time, averaging approximately ten per cent. a year on the capital invested, and from a consideration of the statement made by its president, John L. Howard, to the stockholders, representing the condition of the company for the year 1910, in which he states:

“Total earnings of the company during the first eight years of operation \$2,463,608.26, from which total deductions for depreciation have been made amounting to \$283,640.18, leaving net profits, according to the books, of \$1,179,-

968.08, out of which dividends have been paid of \$614,627.50, or 62% on the capital stock.

“The mines were never in so good condition and have never before yielded their present yield, which exceeds 2,000 tons per day with one shift.”

United States Exhibit 103.

Aside from the conspiracy itself, which is established by both direct and circumstantial evidence, the case is divided into two great branches:

(a) Relating to and showing fraudulent shortages in cargoes at point of importation, and the consequent loss of import duties.

(b) Relating to and showing inaccurate, fraudulent and falsified weights of coal claimed to be delivered as fuel to foreign bound vessels carrying the American flag, and to transports and other Government boats, and the financial loss sustained by the United States.

These two phases of this controversy will be presented in the order in which they are stated, although they are both so intimately connected that many of the facts to which we will have occasion to presently refer will be applicable alike to both features of this case.

**POSITIONS OCCUPIED BY DEFENDANTS AND THEIR
RESPECTIVE DUTIES.**

The defendant, John L. Howard, had been the president of the corporation from the date of its

organization. His principal duties related to the management and operation of the mines owned by the Western Fuel Company which he visited two or three times a year. Among other things, he presided at the meetings of the board of directors and stockholders of the company, kept in touch and familiarized himself with the affairs of the company and prepared the annual financial statements of the company which were submitted from time to time to its directors and stockholders (pp. 110-111).

The defendant, James B. Smith, was, and at all times had been, the vice-president and general manager of the Western Fuel Company, exercising supervision and control over its business and properties excepting that he did not give his personal attention to the operation of the mines. As to the scope of his activities, David B. Norcross, testified:

“James B. Smith is vice-president and a very active vice-president. He is the manager of the business in California, has full charge of the bunkers, the employees here, and the selling of the coal here. He has complete charge of the entire business here and the employment and discharge of the help. He has charge, of course, of the receipt of the coal at this port. He has foremen and superintendents under him to attend to the details. He spends practically all of his time during working hours attending to the business of the Western Fuel Company. I believe that he visits the various properties of the company in San Francisco as the exigencies of the case require. * * * Mr. Smith, by examination of the records of the company, keeps himself in touch with the doings of the company” (pp. 110-111).

Upon this same subject the defendant, James B. Smith, testified:

“I am the active vice-president of the Western Fuel Company and might be termed its general manager. My duties include general office duties, the buying and selling of coal and general management to detail of the business. I have occupied this position with the company since its incorporation, December 15, 1902” (Test., p. 2154).

The defendant, Joseph L. Schmitt, had been a director of the company since the date of its organization and since 1906 had been its treasurer (p. 121).

The defendants, Robert Bruce and Sydney V. Smith, at different periods of time, had been directors of the company.

The defendant, F. C. Mills, from the date upon which the Western Fuel Company actively engaged in business, had been, and still was, the superintendent of its docks, boats and barges, having under his control all of the employees of the company engaged in this branch of its service. As to this, D. C. Norcross testified:

“The defendant, F. C. Mills, is superintendent of the docks. His superintendency includes all of the docks of the Western Fuel Company in San Francisco and dates from the incorporation of the company. Mr. Mills has also had the supervision of the barges and the crews upon the barges and of the employees upon the docks” (p. 122).

The defendant Mills himself testified:

“I am superintendent of the wharves and barges for the Western Fuel Company and have occupied that position ever since the company started,—January 1, 1903. * * * My duties for the Western Fuel Company are to keep the bunkers and yards in proper condition, to carry on the business keep the barges up, deliver coal from barges to steamers, discharge coal into barges, and also the yards and bunkers of the company” (p. 297).

There had also been delegated to the defendant, Mills, the right to employ and discharge men employed in that branch of the company’s service over which he had control (p. 837).

The defendant, E. H. Mayer, was check clerk and weigher on the bunkers maintained by the Western Fuel Company and had occupied that position since the Western Fuel Company engaged in business. As to his occupation, Norcross testified:

“The defendant, E. H. Mayer, is check clerk and weigher on the bunkers, mostly on the Folsom Street bunkers. He has been in the employ of the company since January 1, 1904, and during all the intervening time has been employed in the capacity mentioned. His immediate superior is Mr. Mills” (p. 122).

Mayer himself testified:

“I am at present in the employ of the Western Fuel Company and have been for eleven years. * * * My duties in that capacity (check clerk) are to take the weights from the Custom House officers as they read the weights off the beam, and to distribute the coal” (p. 1985).

While ships were discharging foreign coal at the various docks maintained by the Western Fuel Company, the defendant, Mayer, on behalf of the Western Fuel Company, kept the weights of the coal being discharged, directed its distribution, and made and kept records showing the various places where such coal was distributed, and the weights thereof, both in tons and pounds; he also had under his immediate control and direction, the employees of the Western Fuel Company working upon the docks and wharves upon which coal was being discharged (Record, pp. 263; 696; 1035; 1063-4; 1280-1).

The exact character of the duties discharged by Mayer in this connection will be developed in greater detail later on in this brief.

The defendant, Edward J. Smith, had been employed as a checker and clerk upon the barges of the Western Fuel Company since January, 1910, checking the tubs of coal as they were weighed (pp. 122; 1984).

The secretary of Western Fuel Company was David C. Norcross, who had acted in that capacity since the first meeting of its board of directors (p. 104).

So that the court may appreciate the force of the testimony which was introduced on behalf of the Government, demonstrating the truth of the allegations of the indictment, in so far as they related to the convicted defendants, and so that it may

understand the manner in which the fraudulent conspiracy alleged, was carried out, and its purposes accomplished, it is essential to describe with some detail certain portions of the properties maintained by the defendant and the manner in which it transacted its business, so far as the importation, discharge and handling of foreign coals are concerned.

DISTRIBUTIVE SYSTEM.

The principal plant of the defendant, aside from its coal mines, was situate in San Francisco, California, at which place were located its office, its yards, its wharves and its bunkers, with the exception of a wharf and bunker known as the "Howard Bunkers", located at Oakland.

The only wharves in San Francisco at any time used by the Western Fuel Company in the importation of coal, were the Vallejo Street, Green Street, Howard Street, Mission Street and Folsom Street wharves. The Mission Street dock was the dock first used by the Western Fuel Company, it having taken possession of it on January 1, 1903. Its use was continued until some time in 1910-1911, when it was dismantled (p. 105).

The Folsom Street dock and bunkers were acquired by the defendant in July, 1904, since which date it has been continuously used by it (p. 105). It is with this dock and bunkers that we are principally concerned, because it was there that most of

the foreign coal was discharged. Upon this subject, the witness Norcross, secretary of the Western Fuel Company, testified:

“I would say roughly that 60 or 65% of the foreign coal imported by us into San Francisco was discharged at the Folsom Street dock or bunkers. The remaining portion of such foreign coal was discharged at Oakland or Mission Street wharf and at Vallejo Street. Not very much coal has been discharged at Vallejo or Mission Street, however, most of the coal not being discharged at Mission Street, being discharged at Oakland” (p. 106).

And again:

“The greater portion of our foreign coal is now and has been for years discharged at the Folsom Street bunkers” (p. 124).

The witness, David G. Powers, also testified:

“From 1908 until 1911 the Folsom Street dock was more frequently used for the discharge of foreign coal than any of the other docks” (p. 701).

PHOTOGRAPHS OF THE LOCUS IN QUO.

Attached to this brief in an appendix, are a number of photographs reproduced from some of the exhibits. Their examination by the court will greatly facilitate its labors in studying the record.

FOLSOM STREET DOCK, BUNKERS AND CONNECTIONS.

The Folsom Street wharf or dock was located at the intersection of Folsom Street and the Embarca-

dero in San Francisco, and projected in a northeasterly direction into the San Francisco Bay for a distance of 530 feet. The floor of the wharf was located about seven feet above the waters of the bay. Located upon this wharf was a superstructure consisting, among other things, of two bunkers. The top of these bunkers was 35 feet above the floor of the wharf. The aggregate length of both bunkers from northeast to southwest was 530 feet, extending practically from the shore line to the end of the wharf. Their width from northwest to southeast was 40 feet 9 inches (p. 63).

OFF-SHORE BUNKER.

For the purpose of convenience, when hereinafter referring to directions we will assume that the Folsom Street wharf and the bunkers located thereon, run in a northerly and southerly, instead of a northeasterly and southwesterly direction, and that the lines running at right angles thereto run in an easterly and westerly direction.

One of these bunkers was known as the off-shore bunker, occupying that portion of the superstructure extending in a westerly direction from the easterly end of the wharf for a distance of 230 feet. This bunker was divided into twenty-one compartments or pockets, each of which was designated by number and constituted a receptacle for the coal which from time to time, by means of a conveyor which was

moved from pocket to pocket, was checked into and laden upon barges and other boats. Each of these pockets or compartments, with the exception of the most easterly one, had a dip or slant in a southerly direction facing the waters of the bay. At the extreme easterly end of the bunker was a pocket which faced in that direction. Connected with this bunker and on the northerly side were three small pockets which dipped northerly and, as the evidence showed, were used for screenings. The width of each of these pockets other than those used for screenings, was approximately ten feet (p. 64; also United States Exhibit 1).

IN-SHORE BUNKER.

The in-shore bunker immediately adjoined the off-shore bunker on the west and ran in a westerly direction for a distance of 288 feet 6 inches. It contained five pockets, varying in width from 18 feet 6 inches to 130 feet. The dip or slant of these pockets was in a northerly direction. Connected with the bottom of the in-shore bunker and also facing northerly, were a number of chutes, by means of which the coal deposited in the in-shore bunker and its various compartments or pockets could be discharged. These chutes were located a short distance above the floor of the wharf itself, and were used for the purpose of discharging into wagons for local distribution (p. 65; see also, Defendants' Exhibit B. See Appendix.)

This superstructure, which contained the two bunkers already described, connected at its westerly end with a tramway or bridge, which extended westerly across the Embarcadero into and over the yards of the Western Fuel Company located on the westerly side of the Embarcadero (commonly known as East Street), in which was deposited from time to time a portion of the coal imported by it.

At the westerly end of the in-shore bunker was located the scales-house. Elevated a distance of about six and a half feet above the southerly side of the bunkers were two large parallel rails, known as the hopper track. This track extended over both bunkers, and was supported by uprights. Upon this track were located four large movable hoppers or towers on wheels into which the coal being removed from the vessel under discharge would be immediately dumped.

When a ship would be brought to the Folsom Street dock to be discharged she would be located immediately opposite the in-shore bunker. Each of these hoppers would be moved along the hopper tracks, so that a hopper would approximate each hatch of the vessel. The coal would then be taken out of the hold of the ship, brought up through its hatches in buckets, and dumped into these hoppers (p. 82).

BUNKER TRACKS.

Located upon the top of these two bunkers, paralleling each other and extending their whole length.

were three tracks, the gauge of which was three feet. On the northerly side of the bunkers was a walk or passageway, about four or four and a half feet wide, extending its whole length (p. 65). The distance between that walk and the north track was seven feet. The distance between the north track and the middle track was eight feet four inches. The distance between the middle track and the south track was four feet two inches. South of the south track was a board walk extending along the entire length of the bunkers. The distance between the south rail of the south track and this board walk was four feet one inch. The middle and southerly tracks were located under the hopper track and on the south side of the bunkers (pp. 65-66, United States Exhibits 1 and 2).

On account of the position of the vertical chutes descending from the bottom of the hoppers, the coal cars could be loaded with coal only when standing upon the south track. The northerly track was located between the hoppers and the northerly side of the bunkers. This track and the middle track were used for switching purposes and to distribute coal at various points along the bunkers into the pockets or compartments below (p. 1044).

These three tracks extended from the easterly end of the off-shore bunker and over the in-shore bunker in a westerly direction past the scales-house, converging on the tramway extending to the company's yard. The middle and south tracks passed

the scales-house on its south; the northerly track passed it on its north.

SCALES HOUSE ON FOLSOM STREET DOCK.

About 10 feet 8 inches westerly of the westerly end of the in-shore bunker and near the point of intersection between the westerly line of the Embarcadero and the Folsom Street dock was located the scales-house in which were contained the scales upon which the imported coal discharged at Folsom Street dock was weighed. The floor of the scales-house was elevated above the level of the top of the bunkers, on one side 6 feet 5 inches, and on the other, 7 feet 1 inch (pp. 67; 74). Its dimensions were 8 feet by 7 feet, its length running north and south (p. 99; see also photographs, United States Exhibit 5).

The scales-house contained three windows, one facing north, another south and the third west. Access to the scales-house was gained by stairs which led to a door, facing east, containing glass panels (p. 89).

In this scales-house were two scale beams connecting with the platform scales, resting on the top of the bunker. By means of these beams discharged coal would be weighed, and the weight of the coal would be determined by the weighers. These beams, extending north and south, were located on the extreme west side of the scales-house. They were so close to the west wall of this enclosure that it was

impossible for a weigher to locate himself between the wall and the beams (United States Exhibit 12).

As to this matter Mr. Thomas H. Selvage, assistant United States District Attorney testified:

“I am familiar with the scale-house located above the dock immediately above the scales connected with the north and south tracks respectively. I have been inside said scale-house. We took two photographs of the interior of the scale-house. There were two scales beams therein. Those beams were located on the west side of the house. * * * The scale beams are up against the side of the scale-house as I remember it, so that there is no space in which a person can locate himself between the scales beams and said west side of the house and take weights, looking in an easterly direction down the tracks or toward the hoppers; * * *” (pp. 92-3).

GOVERNMENT WEIGHER FACING WEST.

As has already been shown, all activities connected with the discharge of foreign coal at the Folsom Street dock, from the very moment that it left the hold of the ship from which it was discharged until it reached its ultimate point of distribution from the bunkers with the exception of that portion of this coal which, after being weighed, was carried across the tramway and deposited in the company's yard on the west side of the Embarcadero, and excepting the weighing of the coal itself, took place east of the location of the scales-house. If coal were being discharged directly from the hoppers into the in-shore bunkers, or if coal cars were filled

to such an extent that the coal would roll over their tops and into the bunkers below, or if the sides of the cars were to be opened to discharge coal into the bunkers below before it was weighed, all matters in which, of course, the Government was interested, and which practices as revealed by the evidence were frequently indulged in, the position of the United States weigher in the scales-house was such that none of these things could possibly come under his observation.

As to this peculiar and significant situation, the testimony is without conflict.

The witness Selvage testified:

“That is to say, the person taking the weights must face around with his back immediately toward the dock and hoppers and toward the place where the coal is being loaded into the cars” (p. 93).

Special agent, W. H. Tidwell, who visited the scales-house while a ship was being discharged, described the situation as follows:

“The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. He was facing west, with the beam of the scales in front of him, and with his back toward the hopper and the bunker” (p. 305).

W. J. Dougherty, chief weigher for the Government, testified:

“The weigher at the scales-house faces, as near as my judgment is, towards the west, with his back toward the operations on the dock.”

David G. Powers, another witness for the Government, testified:

“At Folsom Street the scale-house was located on the westerly side of the dock, and the weigher faced in the westerly direction with his back toward the operations” (p. 703).

Aside from this inexplicable peculiarity, the very circumstance that the scales-house was raised above the top of the bunkers, itself prevented the Government representative engaged in weighing coal to view to any considerable extent the operations surrounding the discharge of coal, even though he had been, as he should have been, facing in an easterly direction towards, instead of from, the dock.

That the exact location of the cars being weighed upon the southerly platform scales, whether or no there was anything interfering with the taking of a proper weight, or what effect, if any, the beam hereafter referred to had upon the coal located upon these cars, or what, if anything, became of such coal, could not be observed by and could not be known to the Government weigher in the scales-house, is also made clear from the evidence.

As to this the witness Selvage testified:

“From the position the weighers would occupy I was unable to see either the platforms of the scales or the chutes beneath the hopper. I could see a very short distance on the track looking easterly. The weigher could not get that view without getting up and changing his position. Having gotten up and looking out through the south window, he could see a por-

tion of the platform upon which the train rested
at the time it would be weighed.

* * * * *

If you stood up where the chairs were, where the weigher is situated, you could not see those objects. * * * The chair in which the weigher sits is quite a little distance from the south window. The scales are more to the north side than to the south side. Even a small man could reach the south window from the chair by one step, having reached the window he could see a portion of the cars on the platform" (pp. 98-99).

As already stated, the four hoppers into which the coal was primarily discharged, were located over the in-shore bunker. The first of these hoppers, approximating the forward hatch of the ship being discharged, would be spotted in the neighborhood of forty or fifty feet from the scales-house. Each hopper being directly beyond the other upon the same track, the first hopper, of course, interrupted the view of one looking in an easterly direction from the scales-house, and prevented any of the succeeding hoppers being observed. In fact, even though no cars were located under the first hopper, the elevation of the scales-house would prevent that portion of the in-shore bunker located under any of the remaining hoppers, being seen. Even when cars were located under the first hopper, for the reasons already given, it was not possible for one standing in the scales-house looking east, to see the mouth of the chutes connected with the bottom of the first hopper through which coal was being discharged

into the cars below. As to this situation there is no conflict in the evidence.

To this point the witness Selvage testified:

“There is a window immediately to the south of the door on the east side of the scale-house and facing the dock and coal hoppers. I recall looking out of that window to ascertain whether one could see the scale platform from the scales-room, and I could not see it. A weigher in the scale-house facing the east instead of the west and looking through the easterly window would not be able to see beyond the first hopper. I could not see the track beneath the first hopper. I do not recall seeing any cars stationed at any time under the first hopper while I was in the scale-house. It would not be possible for a person standing in the scale-house and looking in an easterly direction to see the mouth of either one of the two chutes emerging from the bottom of the first coal-hopper, or to see the coal being dropped through the mouth of either of those chutes into a car beneath said first hopper, or to see what was being done under any of the other three hoppers” (pp. 93-4; see also photograph, United States Exhibit No. 20).

The witness Dougherty corroborated Selvage and said:

“If he (the weigher) were to turn around, during the rapidly moving operations on the bunkers, he could, from his station in the scales-house, not see much of anything. He could see the westerly side of a hopper, but he could not see the coal coming up; he could see part of one car that is being loaded from the hopper nearest to the west. I do not think, however, that he could see the coal actually being discharged even into the first car. * * * If the weigher turned around he could not then see the coal

discharged from the first hopper into the cars located underneath the hopper. He could only see part of the car. He could not see the entire operation. My impression is that he could not see the chutes protruding down from the bottom of the first hopper. The weigher from his position in the scales-house cannot see the position of the cars upon the scales. The space between the top of the coal-cars and the bottom of the hoppers is not very great" (pp. 356-7). * * *

"This photograph (United States Exhibit No. 7) represents just about what you can see by looking out of that window where there is no coal-car underneath that first hopper. * * *

If the weigher were to get up and go to the window he could not see beyond the first hopper for any material distance" (pp. 357-8).

Special Agent Tidwell, who visited the docks while ships were being discharged, testified:

"On the occasion that I have referred to, when I was in the scales-house when they were discharging a vessel, the first hopper was 40 or 50 feet from the scales-house. I do not recall whether coal was then actually being discharged through the chute from the bottom of the first hopper into the cars, but coal was actually being discharged from several towers at that particular time. I could see practically nothing except probably the bottom of the cars or the walls of the cars under the first hopper. So far as the chutes were concerned, it was impossible to see them from the scales-house. The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. *He was facing west with the beam of the scales in front of him and with his back toward the hopper and the bunker.*"

SCALES.

On each side of the scales-house was located a large platform scales. The southerly track already referred to ran along and over the southerly platform. The northerly track, which passed the scales-house on the north, ran over the northerly platform connecting with the other two tracks west of the scales-house and just east of the tramway (see United States Exhibits 4, 5, 16, 17, 18 and 159; Defendants' Exhibits D, G and H).

These scales were what is known as the Fairbanks-Morse type. Their component parts and the manner in which they were connected with the beams located in the scales house were described by the witness, Tietjen, called on behalf of the defense (pp. 1377 et seq.). The southerly platform was the one ordinarily used for the purpose of weighing the cars loaded with coal. After the loaded cars were weighed, they would proceed westerly a short distance, then continue on their journey, taking the coal over to the yard, if it was to be distributed there; otherwise they would switch back upon the northerly track running along the bunkers and dropping the coal into the pockets of either the in-shore or off-shore bunkers, following the directions of the defendant, Mayer (pp. 262-5; 694-5).

These scales had a capacity of 25,000 pounds (p. 1986). The beams located in the scales-house are described by the witness Moynihan (pp. 291-2), have already been referred to, and are reproduced in

some of the photographs introduced in evidence (United States Exhibits 12 and 13).

RODS CONNECTING PLATFORM SCALES WITH BEAM.

Running along on each side of the north upright supporting the scales-house, through the floor of the scales-house and connecting with the scales beams were two rods. These rods were unprotected in any way and completely exposed. These rods are thus described by the witness Donegan:

“Last Saturday I examined the structure immediately underneath the scale-house and between its floor and the tracks. There are two rods there exposed for a distance of 9 feet which descend from the floor of the scale-house to the floor of the bunker (p. 72).

* * * * *

(Pointing out on Defendants' Exhibit 'F' two rods, one upon either side of the north upright which apparently supports the scale-house, the witness here said that these two rods were the rods connecting with the beams in the scale-house.) I did not notice a covering of any kind upon either of these rods” (p. 85).

That the maintenance of these rods in the manner indicated is clearly improper was shown by defendants' witness, Tietjen, who testifying to the usual practice of protecting scales rods, said:

“Sometimes the rods of the scales are thus boxed and sometimes they are not. The box at times gets knocked off. The general way, however, is to box the rod in. *I think it should be covered in. It is bad construction to have it exposed*” (p. 1398).

And, as indicating the reason why it was essential to box in or protect these rods, the same witness testified:

“Q. What is the effect of the pressure of one’s foot against the beam-rod?

A. The minute you put your foot against the beamrod it will stop the scale from weighing. It is really hard to tell how much pressure, it is according to how hard you put your foot against it.

Q. A slight pressure might make quite a difference in weight?

A. Yes, maybe 100 or 200 lbs.

Q. That is, the mere pressure of the sole of the foot against the beam-rod would make a difference of several hundred lbs., would it not?

A. Yes, probably 500 lbs.” (p. 1392).

And again,

“The extent to which the weighing is affected by pressure against the scale-rod depends altogether on the amount of pressure. A slight pressure would affect the scales a whole lot; that it is, the sensitive part of the scale. A very slight pressure would affect the scales slightly; a very heavy pressure would affect them considerably” (p. 1396).

In fact, the testimony shows that a strong wind blowing against these unprotected rods would itself affect the accuracy of each weight taken to the extent of 50 or 100 lbs. in favor of the Western Fuel Company.

BEAM LOCATED OVER PLATFORM SCALE.

Between the south side of the scales-house and the southerly side of the superstructure was lo-

cated a large wooden beam or girder extending north and south which assists in the support of the scales-house. The thickness of this beam was 12" x 6" (pp. 71, 74). This beam, at a point immediately above the center of the southerly track, running along the southerly scale platform, had the appearance of being roughed up or chewed out for about an inch and a half (pp. 72, 83). This portion of the beam was weather beaten, indicating that the condition described was not of recent origin. As will be subsequently shown, its condition was caused by contact with coal with which the cars would be overloaded, which coal would be knocked off the cars on to the ground and shoveled into the bunkers below without being weighed. The height of the coal cars, above the rails, was 5 feet 10 inches. The distance between the top of the car and the horizontal beam just mentioned was 1 foot 2 inches (p. 74; see also photograph, United States Exhibit 5).

Location of Hoppers.

The hoppers into which the coal would be directly discharged from the ship, were always located over the in-shore bunker. None was ever placed over the off-shore bunker. This fact is of the utmost importance in this case because, as we will hereafter show, the coal that was not weighed was invariably permitted to drop into the in-shore bunker, while the coal that was deposited into the pockets of the off-shore bunker went first upon the scales and was weighed, thereby enabling the officials of the West-

ern Fuel Company to know almost to a pound the exact weight of the coal contained in the offshore bunker. Upon this point the witness, Joseph Waterdoll, testified:

“These hoppers or towers into which the coal would be discharged, would practically always be located over the inshore bunker” (p. 1035).

The reason for this is described by Norcross, who stated:

“The ship is ordinarily discharging toward the inshore bunker. If we had a vessel at the other end, the barge could not get in so as to draw up to the offshore bunker. The hoppers are located over the inshore bunker, so if any coal should by any possibility or through any inadvertence fall and locate itself in the cars as the coal is being dumped from the hoppers into the cars, or fall over the sides of the cars, it would not fall into the offshore bunker because there are boards there to keep it from falling anywhere except on the floor. The coal could not fall into the offshore bunker at the time of discharging, because the offshore bunker is at the other end of the bunker. The coal which finally finds its way to the offshore bunker has already been on the scales and has been weighed” (pp. 245-246).

Connected with each of the four hoppers already described are four chutes, two descending in a northerly direction toward the northerly track, and the remaining two chutes descending in a southerly direction from the bottom of each hopper, coming to a termination immediately above the center of the southerly track (pp. 68, 73, 87). Two cars loaded with coal from a hopper would be weighed

at one time. The weight of these two cars was about 9000 lbs. When loaded with coal, the gross weight of coal and cars would be approximately 20,000 lbs. or five long tons.

According to the testimony, these latter two chutes located underneath the hopper were the only chutes through which coal was discharged into the cars (p. 82). The discharge of coal through each of these chutes into the cars below would be controlled by a gate operated by hydraulic power (p. 1035). It frequently occurred that the gate could not be closed while coal was discharging, the result being that the car would be overflowed, the coal running down from the overloaded car into the bunkers below (pp. 1035-6).

Ordinarily when a vessel was being discharged, two trains would be used by the Western Fuel Company in relieving the hoppers and distributing the coal. Each of these trains consisted of four cars and a controller or motor, the propelling power being electricity applied by means of a third rail, which was installed about three or four months after the bunkers were acquired by the Western Fuel Company, until which time an overhead trolley was used (pp. 1034, 1037).

At first, each of these trains was operated by two men. This system was changed and the control given to one man, who, while the train was operated, located himself between the second and third cars (p. 1037).

The body of coal cars used upon these bunkers when the cars were closed was shaped like the letter

"V". When the train would reach the point where it was desired to discharge the coal, a rope connected with the bottom of the sides of the car would be pulled, thereby causing the sides of the car to open and hang perpendicularly, thus allowing the coal to drop into the bunkers below (pp. 1036, 1064). When four hoppers were being operated, as is customary, each of these trains would handle two hoppers, one hoppers 1 and 3; the other, hoppers 2 and 4 (Test. Griffin, p. 1064). With the exception of occasions, to which reference will hereafter be made, trains, when loaded, would carry the coal to the scales-house where they would be weighed, two cars at a time, on the south scale platform. After being weighed the train would be run for a short distance in a westerly direction, returning when the coal was to be discharged in the bunkers on the north side of the scale-house over the north scale platform, and along the northerly track until it reached its destination (p. 1044). After unloading, by means of switches the train would again reach the southerly track and relocate itself under the hopper from which it was intended to take coal.

**Destination of Cars and Distribution of Coal Controlled by
Defendant Mayer.**

That defendant Mayer was the directing mind so far as operations on the bunkers were concerned, cannot be disputed. The witness Waterdoll, who operated one of the coal trains, testified:

"I know the defendant, Eddie Mayer, and have known him ever since he came in contact with the Western Fuel people on the Folsom Street bunkers. * * * He was a boss

up there; he was boss and weigher, both. He was my boss, and he was boss of the other motormen employed by the Western Fuel Company and all the men working upstairs, except the engineer. He gave instructions and directions to the men. * * * When coal was discharged into these cars and brought over to the scales and weighed, it would sometimes be carried to the pockets of the offshore bunkers and sometimes to the yard pockets. I got my instructions where to discharge coal from Mr. Mayer. He would indicate to me which particular pocket of the offshore bunker to put the coal in. I would follow the instructions given me by Mr. Mayer (pp. 1034-5). * * *

I received instructions from the defendant Mayer to dump a car into the bunkers before it would reach the scales (p. 1038).
* * * * *

At the request of Mr. Mayer I discharged a train load of coal into one of the pockets or compartments of the inshore bunkers without bringing it on the scales (p. 1039)."

The witness, Samuel Griffin, who at times was also employed operating one of these coal trains, gave like testimony. He stated:

"My immediate boss when I was working for the Western Fuel Company was Eddie Mayer" (p. 1064).
* * * * *

I received instructions from the defendant Mayer regarding the operation of this motor on the trains, and regarding the discharge of coal" (p. 1065).

As to the capacity of Mayer, the witness, G. L. Hahn, Assistant Weigher on the Folsom Street bunkers, testified:

“Mr. Mayer is one of the weighers on the Folsom Street dock. I guess he does most of the weighing for the Western Fuel Company” (p. 263).

See also Test. of David Powers (pp. 694-97); Test. of Edward H. Mayer (pp. 2001-2).

LACK OF SUFFICIENT COVERING OVER BUNKERS.

One of the claims urged by the Government and conclusively established by the evidence was that coal was not only permitted to be discharged, but was, by some of defendant's employees, acting under positive and explicit instructions of the defendant, Mayer, deliberately discharged into the pockets of the in-shore bunker without being weighed. This was accomplished in a number of ways. At times the cars would be filled to overflowing, the surplus coal dropping down its sides and into the bunkers below, and other times the sides of the cars would be opened, thereby enabling the coal to fall from the cars into the bunkers, and upon other occasions, in the absence of cars, the hopper chutes would be opened, thereby permitting the coal to drop directly down below the tracks. It is obvious that if the top of the in-shore bunker had been planked or decked, this situation could not have existed.

The Folsom Street bunkers were acquired by the Western Fuel Company in July, 1904, from the Dunsmuir (p. 224), who, prior to that time, had been engaged in the wholesale coal business in San Francisco. While being used by them, both the

off-shore and in-shore bunkers were entirely covered and decked. The witness Samuel Griffin, who had been employed from time to time by the Dunsmuirs as an operator of one of these coal trains, testified:

“I would be employed by the Dunsmuirs every time a steamer came in. I was running a motor. The bunkers were then planked and were so planked during the entire time of my employment with the Dunsmuirs. There were then three tracks on top of the bunkers during the entire time I worked for the Dunsmuirs.

* * *

When the Western Fuel Company took charge, there was a kind of plank, I guess about four feet wide on the tracks, for the coal coming out of the hopper, that was supposed to save the coal from going into the bunkers, and it was this planking over the bunkers, of which I have spoken, was taken out altogether. I could not say just when that was done, but I know it was considerably after the Dunsmuirs left the place” (p. 1063).

Upon this same subject the witness Waterdoll testified:

“The runway on the bunkers, of which I have spoken, was maintained by the Dunsmuir people. When the Western Fuel Company took over the bunkers they took up the plans to make more room for coal. Previously there had been planking on the inside of the bunker. I am familiar with the location of the tracks on top of the bunkers. The bunkers were floored on the inside and underneath the hoppers in the time of the Dunsmuirs. That was a solid flooring” (pp. 1033-4).

PURPOSE AND EFFECT OF PLANKING.

The result of this planking was that when coal dropped down from the sides of the cars or fell from the chutes, it would be prevented from going into the bunkers below and could readily be shoveled into the cars so as to enable it to be weighed. This made manifest by the testimony of the witness Waterdoll, who said:

“Before the decking or flooring was removed, if coal dropped down from the sides of the cars, as the cars were being loaded, it would lie on the platform” (p. 1034).

Griffin also testified:

“When the Dunsmuirs were there, if coal dropped down on top of the bunker, it could not go below; but after the Western Fuel Company took up the flooring, if coal would drop down it would go down into the bunker” (p. 1063).

 REMOVAL OF PLANKING.

Almost immediately after the Western Fuel Company acquired the bunkers, this planking was removed, with the exception of that portion extending to a point 10 feet 8 inches east of the scales-house (p. 74). The witness Waterdoll testified:

“After the Western Fuel Company took possession of the bunkers, *they took away this permanent decking or flooring to which I have referred. They took it away, and left the top of the bunkers open.* * * * The Western Fuel Company continued to use the overhead trolley during a period of four months; then they resorted to the middle rail. *The planking had been taken up, however, before the third rail was installed*” (p. 1034).

And Griffin, from whom we have already quoted, corroborated this testimony in stating:

“But after the Western Fuel Company took up the flooring, if coal would drop down, it would go down into the bunkers” (p. 1066).

This evidence thus given by the witnesses Waterdell and Griffin, was not contradicted. It therefore stands as an undisputed fact in this case.

TEMPORARY PLANKING.

Some time later, in response to complaints made to Collector of Port Stratton that inexplicable shortages had occurred in the discharge of foreign coal at the Folsom Street dock, an order was issued by the collector requiring the Western Fuel Company to provide covering for the inshore bunker in the vicinity of hoppers that were being used to discharge coal. Accordingly, it was arranged that while a ship was being discharged, temporary planking should be laid underneath and in the immediate vicinity of the hoppers being used. For this purpose a number of planks were cleated together, which would cover portions of the inshore bunker, and the position of which could be changed from time to time, corresponding with the location of the hoppers which, of course would have to be changed to accommodate them to the position of the ship's hatches. According to the contention of the Government, established by a mass of evidence, this temporary planking was but seldom

used, frequently laid only when the presence of Government inspectors was known or anticipated.

For the purpose of familiarizing themselves with the Folsom Street dock and the manner in which coal was discharged, several visits were made to the bunkers by Mr. Selvage, Assistant United States District Attorney; Mr. Tidwell, Special Agent, and others. With respect to this temporary planking Mr. Selvage testified:

“I do not recall any temporary flooring or decking over the inshore bunker between the middle track and the south track until you get pretty well west over said bunker. I was then familiar and am now familiar with that part of the dock located between the south rail of the south track and the extreme south side of the dock, and the condition of that part of the dock when the photographs were taken was just the same as is shown in this photograph ‘United States Exhibit Number 16’ for identification, that is, there was no covering at all over the offshore bunkers and there were some planks resting up against the wall on the inshore bunkers. Some of the bunkers were not covered at all and some of the planks over the bunkers that were covered were elevated somewhat upon the coal beneath them.

(A photograph marked ‘United States Exhibit Number 17’ for identification was here shown the witness.) Portions of the portable flooring or decking were resting up against the extreme south side of the dock at the time when the photograph was taken, as is shown in this photograph” (pp. 90-91).

Again referring to photograph, United States Exhibit Number 19, the witness testified:

“The flooring provided for the space, appearing in the photograph between the south rail of the south track and the extreme south side of the bunker or dock, was mostly laid up against the wall” (p. 92).

And again, on cross-examination, he states:

“I think it very possible that I did observe it at the time,—that is to say, I think it possible I did observe whether or not the boards were out of place while the ship was unloading. My understanding was that these boards were intended to be used to cover different points at different times, since, according to my observation, *there were not boards enough to cover all the space at once*. I refer now to that portion of the bunker occupied by the hoppers at the time my photographs were taken, and to the space between the southerly track and the middle track and between the southerly track and the bulkhead. I think there were probably boards enough to cover two-thirds of the space—that is to say, the space between the two railroads and the southerly road and the bulkhead. I am referring, of course, to the space over the inshore bunkers because there were no coverings whatsoever for the offshore bunkers. Some of the boards were leaning up against the bulkhead and some of them were lying upon the spaces, partly covered—that is, the space would be partly covered but not altogether; but there were not sufficient planks there to cover all of the spaces. * * * I am positive that there were not boards enough to cover all the spaces under all four hoppers. I did not count the boards. But I could see all the boards that were there and there were spaces still uncovered and some of them were leaning against the walls, which, if they had been turned down, they would have covered certain spaces, but there were not sufficient boards to cover the

balance of the spaces. I had no difficulty, however, in seeing that there were not boards enough to cover the space between all four hoppers. I took a flashlight picture of that" (pp. 96-7-8).

The witness Donegan testified:

"Upon one or more of these occasions when I visited the bunkers for the purpose of making measurements, I noticed some of the temporary planking located between the off or south tracks, and the extreme south side of the bunker upon and leaning against the side of the bunker.

* * * * *

I observe upon the photograph marked Defendants' Exhibit 'H' that some of the portable planking has been taken up and is leaning against the side of the last described wall, but when I was actually down there on the wharf the planking was pretty much down and only partially up. I did not testify a few minutes ago that on one or more of the occasions when I was on the dock I saw portions of the decking between the south track and the south wall open and leading against the coal. What I said was that they were partially up leaning on top of chunks of coal, that is to say, the chunks were underneath and prevented the planks from dropping into place. I do not know how the chunks of coal got under this portable planking. I think coal was being discharged at the docks on almost every occasion when I visited said docks" (p. 86).

"There is partial planking between the rails in each one of these tracks—that is to say, there is at some points a firm spike planking and at other points a movable planking which can be taken out. The space between the north track and the middle track from the south rail of the north track to the north rail of the mid-

dle track was open when I visited the docks and not planked at all. That is true of the entire dock extending from the westerly to the easterly end of the dock for a distance of 530 feet, except for a very small space, and the only interruption to the open space there consists of the girders running from one side of the dock to the other. The space between the middle track numbered Track 2 and the south track is open for the entire length except where the ties cross the switches. * * * The distance between the south rail of the middle track and the north rail of the south track and the north rail of the south track is four feet center to center of rail and is open except for a foot that you have to take off for the cap. * * *

The space between the southerly rail of the south track and the southerly side of that dock was closed or covered by movable planking for part of the distance and open for part of the distance. This space is two feet six inches wide" (pp. 66-7).

And again,

"Referring to the space shown in United States Exhibit Number 1 between the middle track and the south track from the westerly end of the offshore bunker to a point about 10 or 15 feet east of the scales, I will say that the space was open the day I was there. I won't say the space was entirely open, but it was here and there planked, a piece perhaps 3 or 4 feet long. I didn't observe its condition except on that particular day. Mr. Tidwell called my attention to it then. On that date the space was open.

Q. Was the space entirely open, or was it closed at intervals by the use of the temporary planking or decking?

A. There was occasional planks" (pp. 83-4).

The witness Tidwell, who visited the bunkers while a ship was discharging, describes what he observed, as follows:

“As I remember it, speaking of the time when a ship was being discharged, the entire inshore bunker under which the north track passes was entirely open, in respect to the space between the two tracks. There was a beam on which rested the hopper, and on the both sides of this beam everything was open. The second track was also open. I mean by the second track the middle track. The third track, and I believe also part of second or middle track on the west side of the bunkers, were covered over partially. There was also a covering on the south side of the third track. There were a number of movable planks there, which were standing up against the south wall of the bunkers, which had not been put in place” (p. 305).

And according to David Powers:

“At Folsom Street there were only a few boards under the hoppers so that the coal would drop down below into the inshore bunkers, the chutes leading from the hoppers were opened or closed by the men in charge of the coal cars” (p. 711).

Griffin recognized that frequently the planks would be missing when coal was being discharged, saying:

“I recall an occasion when temporary planks were placed around the hopper but they were not always there. When they were taken up, they would be placed alongside the hoppers” (p. 1064).

* * * * *

"I suppose the planks would be placed underneath the hoppers whenever a steamer came in. Sometimes, however, they would not do that" (p. 1066).

* * * * *

"The planking is placed down, I suppose, to save the coal from going into the bunkers. I stated that sometimes they forgot to put the planking down" (pp. 1069-70).

According to this witness and others, the existence of these planks availed nothing because even upon occasions when they were utilized, the coal falling upon them would be shovelled down into the bunkers below.

According to Waterdoll, this temporary decking would be taken out at various times during the process of discharging a ship in order to make more room so they could dump underneath the hoppers (p. 1039).

See also testimony of David G. Powers (p. 696) and Edward Powers (p. 868).

INACCESSABILITY TO PUBLIC.

The bunkers where these operations were being conducted were reached by a very long steep stairway located upon its north side. This stairway led to a door over which was a sign "No Admittance" and which was kept locked. To these bunkers the general public were not admitted (p. 123).

While these bunkers could be reached by two other methods, neither one could be taken advantage

of by the public. One consisted of a stairway leading from below the bunkers over near the screening shed, which was enclosed by a fence (p. 85). The other was over the bridge or tramway from the company's yard.

MISSION STREET BUNKERS.

Those portions of the record already referred to disclose that but little foreign coal was discharged excepting at the Folsom Street wharf. So far as the importation of coal was concerned, most of the evidence introduced by both the Government and the defendants centered around the Folsom Street bunkers. It is therefore unnecessary to describe in detail the operations resulting in the discharge of vessels at any other place. From time to time they were touched upon by the evidence, principally, however, in connection with evidence showing specific instances of fraud. We desire, however, to direct the court's attention to one significant fact connected with the Mission Street bunkers.

Scales-House on Mission Street Dock.

The Western Fuel Company went into possession of the Mission Street dock Number 2 on January 1, 1903, and continued to use it until some time in 1910 or 1911 (p. 105). The bunkers which were located upon this dock were removed in 1908 or 1909 (p. 123), or possibly later, the witnesses not agreeing as to the exact date (pp. 107, 701).

Originally this scales-house was located near the shore line elevated above top of the bunkers, similar to its situation at Folsom Street (p. 1995). A short time after the Western Fuel Company took possession of this dock, changes and repairs were made, during the course of which the scales-house was removed to the easterly end of the dock (p. 867). Strangely in accord with the situation existing on the Folsom Street dock, after the removal of the scales-house, the position of the weigher was reversed. In handling the scales and in taking weights, he would be faced in an easterly direction, with his back toward the bunkers and the activities there indulged in (p. 687).

EXPOSED CONDITION OF SCALE RODS.

Between 1904 and 1908 the rod which connected the scales beam with the mechanism below the floor of the scales-house at Mission Street, was exposed for its entire distance between the table of the scales and the floor of the scales-house (p. 696), thus enabling a person sitting at the scales table, by pressing his foot against the rod, to effect and have the scales record incorrect weights, which, as we will hereafter show, was frequently done.

METHOD PURSUED IN WEIGHING IMPORTED COAL.

Inasmuch as the defendants claim that one of the reasons for the shortage evidenced by the out-

turn weight of discharged cargoes of imported coal, as compared with the invoice or bill of lading weight, is the method pursued by the Government in weighing the coal, it is essential to briefly refer to the evidence relating to this subject-matter.

Article 1482 of the Government regulations applicable to the weighing of imported coal provides:

“a fairly even beam indicates the weight, but as, in weighing merchandise, it seldom happens, that the beam will stand in exact poise, but will go either above or below an even beam, the weight will be taken on a rising beam” (p. 250).

For the purpose of showing to what extent the weighing of coal on the Folsom Street dock favored the Western Fuel Company, two Customs House weighers of long experience testified on behalf of the Government.

As has already been shown, the weight of the coal contained in the two cars that would be weighed, was approximately five long tons (p. 291). On the lower of the two beams used in weighing, each five pounds in weight was indicated (p. 292). According to the witness Moynihan, who has been an assistant weigher in the Custom House for eighteen years, weighing the coal on a rising beam meant the shifting back of the poise until the beam would gently rise above the horizontal (pp. 293-294). The excess weight resulting from this operation, according to the judgment of the witness, was between five and ten pounds every time two cars of coal were weighed, the witness stating:

“Q. Mr. Dunne has asked you how close to an absolutely accurate weight you weigh the coal at the time the coal is weighed. I will ask you this question: In your judgment as a weigher, having 18 years experience, how close to the actual weight of the coal is the coal weighed when it is weighed by you upon a rising beam?

“A. We try to get it within the decimal of 10 lbs. over and under 5 lbs.

“Q. 10 lbs. over and under 5 lbs.; so that, in your judgment as an experienced weigher, the actual weight of coal would be within 10 lbs. of the weight taken upon a rising beam?

“A. Yes.

“Q. And that is 10 lbs. in how much net weight of coal?

“The Court. About 5 long tons” (pp. 301-302).

The witness J. W. Dougherty, who was chief weigher at the Customs House, described a rising beam as being

“A beam as when released by the upper brake, if the scale is at balance, will rise with a gentle upward motion, and if allowed to come to rest or to equilibrium, will rise at the center of the scale” (p. 342).

He further testified that he never witnessed the practice indulged in of weighing the coal when the beam would rise rapidly, and that where five tons were being weighed the difference in weight between that obtained upon an even beam and that obtained upon a rising beam would not be over ten pounds (p. 343).

This witness also testified that if the scales were set to weigh a load of 20,000 pounds and a load

of 20,010 pounds were put upon the scales, the beam would rise to the upper brake (p. 354).

While it is true that this testimony was contradicted by the witness Tietjen, called by the defendants, who from experiments claimed that weighing the coal upon a rising beam under the circumstances indicated by the testimony, would favor the Western Fuel Company between 50 and 75 pounds to every two car lots (pp. 1385-6), it is insisted that the testimony of the weighers is entitled to greater weight and must be accepted as conclusive upon this question.

**INVOICES OF FOREIGN COAL OTHER THAN THAT IMPORTED
FROM THE MINES OF THE WESTERN FUEL COMPANY COR-
RECTLY REPRESENTED THE WEIGHT OF THE CARGOES.**

A considerable quantity of coal either directly imported or purchased after importation by the Western Fuel Company came from Australia. Some coal was also brought in from Comox, British Columbia. A very little, if any, was received from Japan. During the year 1912, on account of a strike at the Nanaimo mine, 75% of the coal handled by the Western Fuel Company was imported from Australia (pp. 124-5).

Upon the trial in the court below no testimony was introduced by the defendants tending to attack the integrity of the bills of lading and invoices covering cargoes of coal discharged by the Western Fuel Company, imported from foreign countries other than from its mines at Nanaimo and North-

field. In the absence of such evidence, the jury was justified in assuming that the weight of these cargoes was accurately stated in the invoices. In fact, in the absence of evidence to the contrary, such would be the presumption of law.

Code of Civil Procedure (Cal.), Sections 1919 and 1920;

Wharton on Criminal Evidence, Sec. 527;

Taylor v. U. S., 3 Howe 197; 11 L. Ed. 559;

Buckley v. U. S., 4 Howe 251; 11 L. Ed. 961;

McInery v. U. S., 143 Fed. 729;

Evanston v. Gunn, 99 U. S. 660; 25 L. Ed. 306.

**BILLS OF LADING AND INVOICES OF COAL IMPORTED BY
WESTERN FUEL COMPANY FROM ITS MINES IN BRITISH
COLUMBIA, REPRESENTED THE MINIMUM WEIGHT OF
EACH CARGO.**

Shortly after its organization the Western Fuel Company purchased its mines in British Columbia. One of these mines was located at the harbor of Nanaimo, the other at Northfield. From the time these mines were acquired by the Western Fuel Company until the date of the trial, with the exception of short intervals due to strikes, these two mines were continuously operated by it. Both mines were under the immediate superintendence of Thomas R. Stockett.

The major part of the foreign coal imported into this country by the Western Fuel Company came

from these two mines. Its designation was Wellington, or New Wellington coal. Before being loaded into the ships at the point of exportation it was thoroughly cleansed and screened, and was known as lump coal (p. 107).

BILLS OF LADING AND INVOICES.

When a ship had been loaded with coal, either at Nanaimo or at Northfield, for exportation to the United States, an agent of the Western Fuel Company would make a declaration in writing, in which he would state that the invoice "*is in all respects correct and true*"; that it was made at the place where the merchandise was to be exported to the United States, and that such invoice contained the actual market value or wholesale price of said merchandise at the date of said declaration in the principal markets of British Columbia.

Thereupon the United States consular agent would execute a consular certificate, in which he certified that the invoice referred to in the certificate was produced to him by the signer of the declaration; that he was satisfied that the person making the declaration was the person he represented himself to be, and that the actual market value or wholesale price of the merchandise was correct and true.

The declaration and consular certificate above referred to are endorsed upon the back of the invoice. On the reverse side of the invoice is noted,

among other things, the name of the consignor and its location, the name of the consignee and its location, the name of the vessel, the port of shipment, the ports of arrival and entry, *the value and character of the cargo and the number of tons of coal actually loaded into the ship*. In addition to this, a bill of lading would be issued by the Master, in which would be stated that a *certain number of tons of New Wellington coal, corresponding with the amount designated in the invoice*, had been shipped upon the particular steamer, in good order and condition, by the Western Fuel Company at the port of clearance to the Western Fuel Company or its assigns. The authority of the agent making each declaration was admitted (pp. 209-10).

For samples of invoice and bill of lading see pages 2898-2901, volume 8 of the record.

It sometimes happened that a portion of a ship's cargo would be taken on at Nanaimo and the remainder at Northfield. Under these circumstances a separate invoice and bill of lading would be issued at each of these places, each covering the amount of coal loaded into the ship at the place where the invoice and bill of lading were issued.

THE WEIGHT OF COAL LOADED INTO SHIPS AT NANAIMO AND
NORTHFIELD ASCERTAINED.

The Government claims that the exact weight of each cargo of coal exported from British Columbia was known to the Western Fuel Company; that in

some instances* this exact weight was represented by the bill of lading and invoice, where the ship was entirely loaded at one mine, or two bills of lading and two invoices, where the ship was partially loaded at Nanaimo and completed her cargo at Northfield; that in either instance, as the evidence proved, a larger quantity of coal was actually laden into the ships than that specified or called for by the bill of lading and invoices. In other words, that in no instance would the weight of the coal loaded into the importing ship be less than the weight specified in the bill of lading, or bills of lading, where more than one, and invoice or invoices, as the case might be; that in those cases where the bills of lading and invoices were inaccurate, the weight of the cargo exceeded the amount specified in these instruments.

As a uniform method of weighing the coal mined and exported from these two mines was not pursued, it will be necessary to consider them separately.

Nanaimo Mine.

So far as the coal mined at, and exported from Nanaimo harbor was concerned, the testimony clearly shows that before being loaded upon the ships, it was accurately weighed and every pound of the cargo was known to the resident representative of the Western Fuel Company. While the Nanaimo mine was located at the harbor of Nanaimo, some of the records of the Western Fuel Company show that for a number of years the

Western Fuel Company had been mining this coal under the harbor itself and not upon the property owned by it (U. S. Exhibit 99). The bunkers maintained by the company were located close to the docks (p. 697). If the coal was not directly discharged into the ships, it would be deposited in these bunkers. Upon leaving the mine every pound of coal extracted, would be weighed. It would then be directly discharged into ships or deposited into pockets of these bunkers. If this coal thus deposited into the bunkers was afterwards discharged into ships, it would again be weighed.

This situation was testified to by Harry Cooper who had been a resident of Nanaimo since 1862, at one time had been harbor master, and for several years had been master weigher for the Western Fuel Company (p. 79). Upon this subject he testified:

“I am familiar with the location of the mines at Nanaimo. They had a Fairbanks scales there. I am also familiar with the docks and the bunkers. The bunkers were located upon the docks, or rather close to the docks, on a grade lower. I don't remember clearly, but I think the scale-house was about one hundred yards away from the docks.

I was first employed by the Western Fuel Company as dock-master, but in less than a year I became master weigher, and remained in the latter capacity until a short time before I left. When I was dock-master I frequently entered the scales-house. As master weigher I had to see all the coal weighed, and my station would be in the weigher-house. The practice was to bring the coal from the mine, weigh it and then dump it into the bunkers. During

the entire time I was employed by the Western Fuel Company I never saw a trainload or carload of coal taken from the mine and discharged into the bunkers or into a ship that was not weighed. The tare weight was painted on the sides of the car. Each car also had a separate number. Tare weights were taken frequently—I should say three or four times a year. Record was kept of the scale-house very particularly on separate papers for each ship, and for the local or other trade; of every day's output of coal, and of the weight thereof, and of the kind of coal. *The weights were taken upon a rising beam.* These were called fair weights. I never saw any coal dumped either into bunkers or ship which was not in fact weighed first" (pp. 679, 680).

The witness then described the method of checking the weight of the coal when being discharged into ships (pp. 680-81). He further testified:

"When a vessel was actually at the wharf they would load the coal directly into her. The bunkers contained pockets; and when coal was being discharged into the bunkers, a record would be kept of each car and of the particular pocket into which it was discharged" (p. 681).

And as showing that when coal was taken out of the bunkers it would be reweighed, he further testified:

"When coal was taken from the bunker into a ship it was weighed again, first being taken back to the scales-house and weighed and eventually returned to the dock and the ship where it would be discharged directly from the cars on to the ship" (p. 681).

And as showing the accuracy of the bills of lading invoices, this same witness testified that the

“Invoices were frequently sent to the American consular officials for certification in order to clear the vessel, and bills of lading would be issued to be signed by the master of the vessel. Upon those occasions the invoice weight would be filled in by one of the office clerks, *and such invoice weight would represent the actual scale weight of the coal*” (pp. 681-82).

N. K. Wills, master mariner, who had been in Nanaimo a great deal of the time since 1908, the last time being in October, 1912, directly corroborated the testimony of Cooper. Since 1910 he had been in Nanaimo for about ten months during each year, acting as port warden. His duties consisted in seeing that the vessels were properly loaded and dispatched, before becoming port warden. As master mariner he had charge of a barge having a capacity of two thousand tons, which carried coal from Nanaimo to Seattle. After describing the location of the scales-house, scales and tracks, this witness said:

“The coal which would pass over the spurs or leads and ultimately reach the various docks would first pass over the tracks upon the scales.
* * *

I saw cargoes being weighed at the scales-house while I was at Nanaimo pretty often. I was frequently in the scales-house myself. * * * I used to take a tally of the cars that were discharged into my barge. * * * I did not visit the scales officially, but I did visit them unofficially. I saw them weigh coal. I never saw a carload of coal discharged into my boat while

I was captain of the 'Two Brothers', which had not passed over the scales. I used to obtain my bill of lading and invoice, after the barge was loaded with coal, at the wharfinger's office. * * * The scales-house was within my observation when I was counting the numbers of cars discharged into my barge. I used to see the cars as they approached from the scales-house. Each and every one of those cars that were within my observation first passed over the scales before they reached the dock" (pp. 336-38).

Hugh Edwards who was United States Customs Inspector at Seattle in September, 1907, was detailed as weigher in a scales-house at Nanaimo where he remained for two days and a night continuously, assisting in weighing coal. In detailing his experience he said:

"Coal was brought to the scale-house on small cars of 5 or 6 tons capacity. The bunkers were nearly half a mile from the scale-house and are right on the dock. The coal goes from the scale-house to the bunkers on cars. * * * The coal that I was weighing was discharged directly into the ship. The tare weights were marked on the cars. The weigher informed me that those tares were taken every so often on all the cars. The cars were weighed separately, and not by trains. As the trains came down the first car was weighed and the train was pulled forward sufficiently to weigh the next car and so on to the end of the train. The net weight of the coal was taken by taking the tare weight marked on the car and subtracting that from the gross weight of the car. Record was kept of the weight of each carload of coal by the weigher who had a tally sheet. I do not think that the weights were being taken on what is known as a rising-beam. The weights were taken as accurately as they could be obtained,

not down to the pound, however, but by 5's and 10's as coal is usually weighed. When you weigh by 5's and 10's the weights usually average themselves and even up. No advantage was given to either party in using these weights" (pp. 112-113).

* * * * *

"The only records of the weights of the coal that I know about which were kept by the Western Fuel Company were those taken by the company weigher on tally sheets. I also kept weights myself and kept them accurately and truly, and they agreed with the weights kept by the company's weigher *because we were taking the weights together at the scales*" (p. 114).

F. B. Winebrenner, also weigher for the Government, visited the scales-house at Nanaimo in March, 1909, remaining there four days, during which time he participated in the weighing of coal. His testimony coincides with that of the other witnesses. He stated:

"My recollection is that only one track passed over the scales, and that that was the track which came from the mine to the bunker. All the coal that went from the mines to the bunkers went over the scales. I think my hours of service were from 7 o'clock in the morning until 12 at noon, and from 1 o'clock until 5. The company's weigher worked with me. We took weights together. * * * The cars were weighed one at a time. The tare weight was marked on the cars. The coal having been weighed was taken directly aboard the vessel. I observed at the bunkers that the coal was discharged into a chute and put immediately aboard the vessel" (pp. 118-119).

Thomas R. Stockett, the superintendent, himself testified:

“The coal is brought to the ship at the wharf from the mine in coal-cars, railroad cars; in passing from the mine to the wharf they pass the scale-house, which is located about 1580 feet below the mine, and it is weighed there, and after weighing is passed up to the wharf and dumped on to the vessels.

“The cars hold, generally speaking, about 5 tons, and we make up our train of about 100 tons; that would be 20 cars; they are brought from the mine by the locomotive and are backed on to the scale, one car being weighed at a time, and as each car is weighed it is pushed on down to a tare-track and the next car weighed, and so on until the whole train is weighed” (p. 1448).

While it is true this witness undertook to state that weights at Nanaimo were taken upon what he understood to be a falling beam, that is, with a beam between the lower break and a horizontal position, as against the positive testimony adduced on behalf of the Government showing the manner in which coal was weighed at this place, such evidence was entitled to no weight. Particularly is this true when we consider that the same witness testified that all coal sold by the Western Fuel Company at Nanaimo, including coal purchased by vessels for fuel purposes, was weighed in the same manner, and that such weight, in his judgment, represented the actual weight of the coal. His testimony upon this subject is as follows:

“Q. Now, as a matter of fact, the man who pays for 5,000 tons of coal say, or a man who

buys 1,000 tons of coal for fuel purposes upon his vessel is charged by you up there for more than 1,000 tons, according to the actual weight, is he not?

A. If he gets 1,000 tons he is charged for 1,000 tons.

Q. But that 1,000 tons he is charged for is 1,000 tons figuring upon a falling beam, is it not?

A. Yes, sir.

Q. And the actual weight of that coal is really one-half of one per cent less, is it not?

A. Not according to our method and our system.

Q. According to your system, is not that so?

A. According to our system it is 1,000 tons'' (pp. 1515-16).

See also testimony of Norcross (pp. 107-08).

Northfield Mine.

At the Northfield mine, two methods of determining the weight of coal were pursued. By one method the coal was actually weighed before being discharged into ships. This system was followed until March 16, 1906, after which the weight of the coal was estimated by the draft of the ship, measured by what is known as a ship's scales (p. 1468). On the face of the wharf was located a perpendicular loading tower. To the top of this tower coal would be brought from the bunkers by means of a conveyor. From this tower, by means of another movable conveyor, the coal was carried to the hatch of the vessel and dropped into its hold (pp. 1457-58). Underneath the bunkers there was a railroad track upon which were two large weighing hoppers connected

with weighing attachments. Each of these hoppers held about five tons. These hoppers would be filled up and before passing the coal on to the conveyor, would be weighed. The coal was then dropped by means of a chute on to the belt conveyor that took it out to the tower (pp. 1460-63). By this method, about 200 tons an hour could be weighed (p. 1463).

After March, 1906, the coal would be conveyed to the vessels by means of an easement chute. This system was devised in order to eliminate the breakage of coal caused by being dropped into the hoppers upon which it would be weighed (p. 1466).

With respect to this chute, the witness Stockett testified:

“To do that we devised an arrangement that is shown on this plan which in our parlance is called an easement-chute. We use the same railroad track that the weighing-hoppers run on; instead of two wheels we have a truck with three wheels on—that is because of the length; the easement-chute goes right up to the mouth of the gates from the bottom of the bunker;
* * * Instead of coal dropping right down to here, as it does in the weighing-hoppers, it simply drops on to this incline and passes on down right here to the conveyor; * * *
(p. 1466).

“The easement-chute was to take the place of the weigh-hoppers for the purpose of avoiding the breaking of the coal in passing the coal from the bunkers to the conveyors that carry the coal to the ship” (p. 1468).

The witness then testified that this chute was installed during the latter part of February and the

early part of March, 1906, and was first used on *March 16, 1906*; that since that date it has been continuously used in shipping coal to San Francisco (p. 1468).

After the easement chute was used, it appears that no further weights of the coal were taken excepting by estimates made from the draft of the boat. This procedure consisted in taking the draft of the boat upon arrival and then again taking it while loaded. The quantity of coal loaded upon the ship would then be estimated by the ship's scales (p. 1470).

Each ship has a scale of its own. This scale is on a blue print and gives the dead weight per inch or foot of draft (for illustration see loading scale of Steamer Thor, United States Exhibit 162). Not content with an estimate made by the ship's scales, a comparison would be made from time to time between the estimated weight of the coal while in the bunkers and the weight indicated by the ship's scales. While some discrepancy existed both ways, at the end of each year the weights were practically in accord, the witness stating:

"We regularly made a table showing the comparison between the estimate of the coal in the bunkers and the estimate of the coal in the vessel, when loaded according to the draft of the vessel. I have not brought those tables with me from Nanaimo. *In answer to the question how those estimates compare, I would say that they fluctuate. There would be differences sometimes one way and sometimes the other way, but there would be no great difference in the course of a year*" (pp. 1498-99).

Practice Showing Fraudulent Overloading of Coal.

It will be remembered that the Western Fuel Company was consigning coal to itself at San Francisco. If the estimated weight was not exact, no prejudice could be suffered because the coal would be reweighed upon its discharge. No valid reason can be assigned why the weights inserted in the invoice, solemnly declared to be true, or in the bills of lading, should have been either increased or diminished. Yet we find that coincident with the action of the Western Fuel Company in ascertaining the weight of each cargo by resort to the ship's scales, and by comparisons between such weights and the estimated bunker weight, fifty tons on half cargoes and one hundred tons on full cargoes would be deducted from the weight thus ascertained, and the weight thus diminished would be inserted in the invoices and bills of lading (pp. 1475-76). This practice was indulged in until November 16, 1907, when it was discontinued because it was recognized to be *without reason or right*.

On November 12, 1907, Norcross, The Western Fuel Company's secretary at San Francisco sent a communication to the company at Nanaimo concerning this practice in which he said:

"In the past you have been making our bills of lading on aggregate shipments to us *'less than the actual quantity shipped; I do not know of any reason for your further continuing this, and from now on, please make bill of lading on actual quantity shipped'*" (p. 994).

This letter itself shows that the weights contained in the invoices were false and below the *actual* weight shipped. Between the receipt of this letter, and September, 1908, the bills of lading and invoices corresponded with the weight of the cargoes ascertained in the manner already indicated. That no reason did exist in fact for interfering with these weights is shown by Stockett's testimony on cross-examination, in which, after admitting the receipt of the letter above quoted, he states:

"Do you know if at that time the bill of lading weight and the estimated weight practically agreed, about that time?

A. Well I would judge that that was the reason for it.

Q. And how long do you say after the receipt of this letter did you continue to make the bill of lading weight and the estimated weight agree?

A. Until September, 1908" (p. 1508).

Notwithstanding the fact that the loading weights were found to be correct weights, and that the deductions of 50 tons on half cargoes and 100 tons on large cargoes was found to be unnecessary and irregular, and although nothing had occurred to change or alter the situation already shown, between September, 1908, and June, 1909, this practice in an exaggerated form was again indulged in and 3% was arbitrarily deducted from the loading weight of the cargo, the figures reached after such deduction being inserted in the invoice and bill of

lading as representing the correct weight of the cargo (pp. 1476; 1508-09).

Even Stockett was at a loss to account for this change because, upon this subject, he testified:

“Q. What happened during that period of time to bring about a change?

A. I can't tell you exactly how it came about, but I recall that Mr. Howard was up there in August of that year.

Q. That is, in August of 1908?

A. Yes, sir, and it must have grown out of a talk with him that we were evidently careless in the estimating of our weights because there was a growing difference in San Francisco, and his instructions were to be particularly careful. In September when we started to load a cargo, I gave the order about making the deduction 3 per cent. I wanted to be on the safe side; I didn't want any more than we were entitled to, but I wanted to stop any dispute as between the different departments of the company” (p. 1509).

It might be proper at this time to point out to the court that an examination of the discrepancies between the invoice and outturn weights during this period of time will not sustain this attempted explanation.

That the explanation thus given by the witness had no foundation in fact, is further evidenced by his own testimony, wherein he states:

“Q. In 1907, at the time you received the instructions from Mr. Norcross, the company thought it was dealing fairly with itself by accepting as the bill of lading weights the estimated weight?

“A. Yes, sir.

“Q. It was found by experience that it was dealing fairly with itself, did it not?

“A. At that time” (p. 1511).

Evidently realizing that the 3% deduction could not continue to exist without knowledge being acquired by the Government that the invoice weights were grossly inaccurate, and that an investigation would probably follow, pursuant to the letter received by him from Norcross (p. 1477), the witness reduced the amount to be deducted from 3% to 1%, which deduction was continuously made from June, 1909, until the date of the trial (pp. 1475-1476).

And as showing that no valid reason existed for any reduction whatever this very witness testified that the same elements were taken into consideration at the time he concluded to make the bill of lading weight correspond with the estimated weight as when he had made a deduction of 100 tons and 50 tons (pp. 1511-12).

The testimony of this witness is strangely at variance with the testimony of Norcross. This witness was unable to offer any explanation as to why the practice of making deductions from the actual ascertained weights of cargoes should have been indulged in. It seems that between March 16, 1906, and November 16, 1907, a letter would be forwarded to the San Francisco office, practically every time a cargo was loaded, in which would be set forth the weight of the coal actually loaded upon the

ship. With the exception of the weight these letters would be concluded in the following language:

“Please note that we have charged you with 5823 tons, 100 tons more than bill of lading figures” (pp. 992-993).

Upon this subject D. C. Norcross testified:

“I cannot now, any more than before,, give the reason why these charges were made from time to time against the Western Fuel Company at this place for a greater quantity of coal than apparently was placed in these boats, according to the invoice and bill of lading. It is a fact that from time to time we received letters similar in kind to the ones heretofore introduced in evidence, from the Nanaimo office. I presume it is a fact that we received such a letter practically every time a cargo of Nanaimo coal was sent to San Francisco” (p. 992).

It was likewise impossible for this witness to explain why, in the letter written by him to the company's office at Nanaimo, he had stated that they had been in the habit of making out bills of lading on cargo shipments “*less than the actual quantity shipped*”; that there was no reason for further continuing to do this, and that from that time on “please make bills of lading upon the *actual* quantity shipped” (pp. 994-996).

When the practice of making these deductions again commenced, starting at first with 3% and afterwards making it 1%, a bill would be transmitted to the San Francisco office each time a cargo was shipped, at the bottom of each of which bills ap-

peared in black type the *actual* weight of the coal, in the following language:

“Actual weight of this cargo 5822 tons.”

The statement quoted was at the bottom of a bill calling for 5749 tons 560 lbs. (p. 474), which was the tonnage specified in the invoice.

The effect of this practice can readily be appreciated from the discharge of the steamship “Tintania”. There the invoice and bill of lading called for 5696 tons. When she discharged at this port the outturn, or custom weight, indicated that 5725 tons 890 lbs. had been taken out of the ship. In other words, there was an apparent overage of 180 tons. That such overage would have been converted into a shortage is made clear from the testimony of this same witness, he testifying:

“There was discharged, according to the figures in red ink which indicates the outturn or customs weight, 5725 tons, 890 lbs., or about 121 tons more than apparently was in the boat, according to the sworn invoice and the bill of lading; that is correct, is it not?

“A. 25 tons.

* * * * *

“Q. As a matter of fact, if the figures at the bottom of the bill indicating the actual weight were in fact the weight of the cargo of coal, instead of there being an overage, there would be quite a shortage, would there not?

“A. Yes” (pp. 479-480).

Tidwill himself explains the effect of this procedure:

“Q. Now it is also true, is it not, that in a great many instances, if you take the bills

as correctly setting forth the actual weight of the coal deposited into the steamship at the port of exportation, that instead of there being an overage, there would, in fact, be a shortage?

“A. A shortage, yes, sir” (p. 640).

Practice Not Confined to Northfield Cargoes.

Defendants claim that they were warranted in making these deductions because of the manner in which the coal was weighed at Nanaimo. This was the only reason assigned, or that could have been given for such conduct. That no justification existed for indulging in such a practice at the Nanaimo mine (known as Mine No. 1), was conceded; in fact, Stockett himself testified:

“There was no reason to make a deduction from the cargoes that were loaded exclusively at No. 1 Mine, and at first there was not any; * * *” (p. 1469).

Notwithstanding this situation, the same deductions that were made at Northfield were likewise made in nearly every instance as to the cargoes shipped from Nanaimo. Even Stockett was unable to explain this, because, following the evidence last quoted, he testified:

“Afterwards it seemed to have dropped into the regular course of events and the men who made the bill of lading and invoices out at the general office perhaps overlooked the fact that the vessel was loaded exclusively at the No. 1 Mine. That is the only explanation I can give as to why some of those cargoes have a deduction made from them” (pp. 1487-1488).

At pages 1479 to 1486 is contained a statement showing all cargoes shipped from these two places between April 4, 1906, and January 1, 1913. An examination of this statement will show that many cargoes were entirely loaded at Nanaimo (Mine No. 1), as well as partially loaded there, and that in nearly every instance the deduction testified to was made.

**THE APPROXIMATE WEIGHT OF COAL ON WHICH THE
WESTERN FUEL COMPANY FAILED TO PAY IMPORT
DUTIES.**

During the trial in the court below, invoices covering cargoes of all vessels carrying foreign coal discharged by the Western Fuel Company between April 1, 1906, and December 31, 1912, together with the respective consumption entries made upon the arrival of these vessels in the port of discharge, were introduced in evidence (pp. 213-14). Immediately after these cargoes were discharged, the outturn or ascertained weight would be endorsed upon the consumption entries. The difference between the invoice weight (which was also the bill of lading weight) and the outturn or discharge weight (also called the ascertained weight) would determine whether there was a shortage or overage. If the discharge weight was less than the invoice weight, a shortage to that extent existed in the cargo. If the discharge weight exceeded the invoice weight, it would constitute an overage.

With these entries and certain other records of the Western Fuel Company also offered in evidence as his foundation, special agent Tidwell prepared a table showing all foreign coal in the possession of the Western Fuel Company on April 1, 1906, and covering every cargo of imported coal received by this company between that date and January 1, 1913. A copy of this table will be found on pages 2687 to 2738, Volume VIII of the record. An examination of this table will disclose that it contains a statement of the amount of foreign coal on hand April 1, 1906, the number of the entry, the name of the ship carrying the cargo, the *invoice* weight of the cargo, its out-turned or ascertained weight, and the amount of shortage or overage, as the case might be.

According to this table, the accuracy of which was not disputed, between these two dates the shortage in these cargoes aggregated 26,044 tons 1965 lbs. The overages amounted to 5324 tons 1291 lbs. Deducting the overages from the shortages, a net shortage results of 20,720 tons 674 lbs.

In making these calculations, however, the quantity of coal *actually* loaded upon these vessels is not considered; figures based upon these *actual* weights are referred to later.

It is and was strenuously urged by defendants that because upon these figures the average shortage computed upon the total amount of coal imported only amounted to about one per cent its existence did not tend in any degree to establish fraud. In fact, the same claim was made concern-

ing overages which will be considered later on in this brief. This argument is confessedly illogical and devoid of merit. In the first place, a conclusive and unanswerable response to this claim is found in the evidence to which the court's attention will shortly be directed, establishing positive and specific instances of fraud resulting in, causing and accounting for these shortages.

Again, a general average based upon the entire volume of business done by a corporation is no criterion by which to determine whether specific acts of fraud have been committed because such claim assumes that the course of conduct asserted to be criminal in its character resulting in said general average is consistent with the legitimate and orderly carrying on of such business and inconsistent with any other theory. In the instant case, however, eliminating from consideration for the moment the evidence affirmatively establishing fraud, an examination of the record will not only show that many cargoes ran short 2, 3, 4 and 5 and some as high as 7 per cent, but that when certain cargoes were discharged at San Francisco, a shortage resulted, while, when cargoes were discharged from the same vessel at Oakland, almost invariably an overage would exist, or the shortage, if any, would be inconsequential. The fallacy of applying a percentage test for the purpose of determining whether certain established conditions are the result of criminal conduct can likewise be readily illustrated.

Let us assume that a certain firm is selling coal to the Government.

The volume of business done by this firm amounts to one million dollars a year. During the course of a year the Government is defrauded out of \$10,000, representing the value of coal sold to it and underweighed. The frauds resulting in this loss were committed at irregular intervals during the year. A criminal prosecution follows. The defense is that the sum involved represents only one per cent of the total volume of business done. Would such defense be given any serious consideration in a court of justice? If so, it would follow that the individual defrauding the Government out of \$10,000, whose annual receipts were not very far in excess of that sum, would be forthwith adjudged guilty, while another individual committing the same offense, doing a large volume of business a year, would be immune from punishment. In other words, it would result in one law for the rich and another for the poor.

**Amount of General Percentage of Overage Great Deal in Excess of
That Shown by Table "A".**

From time to time the Western Fuel Company purchased partial or split cargoes of coal. For instance, the Western Fuel Company would purchase a portion of a cargo and when that portion of the cargo had been discharged by it, the vessel would leave its dock and proceed to Oakland, or some other dock where the balance of its cargo would be removed. At other times, the company

would purchase the balance of a cargo, a portion of which had already been discharged. In a majority of these instances, the vessel would turn out short. Inasmuch, however, as it was not possible to establish to any degree of accuracy at what point the shortage occurred, in preparing Table "A" each of these split cargoes was treated as though no shortage occurred (pp. 273-74; 308-09). In other words, the outturn weight would be taken as the true weight. During the trial a supplemental table was prepared by Mr. Tidwell (United States Exhibit 125, Table "D") in which these split cargoes were eliminated (p. 313). While such action did not either increase or diminish the amount of shortage so far as tonnage was concerned, it increased the general percentage of shortage to 1.7 per cent (pp. 310-313).

General Percentages Where Shortages Alone Considered.

In preparing both of the tables above referred to, the overages were taken into consideration and their aggregate amount deducted from the total shortage. If general percentages were to be indulged in at all, they should have been confined to the cargoes that turned out short. Taking into consideration these cargoes alone, the general percentage of shortgace based upon the total weight of the cargoes in which a shortgace occurred, amounted to 1.84 (pp. 385, 672).

General Percentages Where Loading Weights Considered.

If loading weights of cargoes were considered, both the actual shortage and the general percentage would be largely increased.

In a former part of our brief we presented that part of the record showing that the weights specified in the invoices and bills of lading covering cargoes of coal imported from Nanaimo and Northfield were far below the weight of the coal actually loaded upon the vessels. During the trial, a table was prepared showing the actual loading weight, the invoice weight, and the ascertained or out-turned weight of each of these cargoes. This table is United States Exhibit 135 and is contained on pages 2867 to 2873 of the record. According to this table, the net shortage representing the difference between the actual weight at the mines and the ascertained or out-turned weight was 10,280 tons 1445 lbs. The difference between the actual loading weight at the mines and the invoice weight was 6583 tons. The general percentage of shortage based on the actual loading weight was 2.2 per cent. The percentage of shortage represented by the difference between the invoice and out-turn weight was .8 per cent (p. 2873).

It will thus be seen that notwithstanding the fact that the invoice weights were far below the actual weight of the coal loaded into the vessels, a general shortage of almost one per cent occurred at the point of discharge.

Specific Instances of Shortages.

While under examination, Mr. Tidwell gave specific instances of shortages, each of which was taken from Table "A" already referred to. These shortages were based exclusively upon the difference between the invoice or bill of lading weight, and the out-turn or ascertained weight. In no instance was the actual loading weight considered.

A partial list of some of the vessels referred to, together with the specific percentages of shortage will be found on pages 386-387 of the record. The percentage of shortage based upon the invoice weight runs from 2 per cent in some cases, to 7 per cent in others (pp. 386-87).

SPECIFIC INSTANCES OF FRAUDULENT CONDUCT DISCLOSING CAUSES OF SHORTAGES.

It may have been gathered by the court from what has already been said, what the claim of the Government is respecting the manner in which many of these shortages occurred. To briefly re-iterate, its contention is that these shortages were brought about by the following practices:

1. By overloading the coal cars and permitting the coal to drop down into the in-shore bunkers without being weighed;
2. By opening up hopper chutes and permitting the coal to drop down into the inshore bunkers without being weighed;

3. By deliberately opening the sides of cars and dumping the coal into the inshore bunkers before being weighed;

4. By weighing the coal upon a platform scale, a portion of which came in contact with one of its supports, thereby registering incorrect weights;

5. By using a peculiarly constructed link between the second and third cars, thereby forcing an inaccurate weight to be taken;

6. By direct interference with the scales-rod, causing inaccurate weights to be taken;

7. By dumping coal loaded into the coal cars into the inshore bunker without being weighed, and during the absence of the Government weigher.

Each of these charges is supported by affirmative and specific proof, the truth of which was believed by the jury.

DISCHARGE OF UNWEIGHED COAL INTO BUNKERS.

That coal was frequently permitted, without being weighed, to drop into the bunkers below, and upon many occasions, under express instructions, was dumped and shoveled, without being weighed, into these bunkers, was thoroughly established. In this connection it might be well to state that it was the duty of the Western Fuel Company to maintain a permanent flooring about the hoppers while coal was being discharged, or at least locate a temporary flooring in their vicinity and it cannot absolve itself from liability by claiming that a considerable

quantity of this coal dropped into bunkers below without affirmative action on its part.

With reference to this matter the witness Waterdoll testified:

“If the hopper gets away from me, she would be liable to bury my car. That is, the weight would take too much of a run on the gate and she would overflow; you couldn’t pull up the gate quick enough. *That occurs quite frequently. The coal would then roll off the car and down into the bunkers underneath.* * * * It is pretty hard to say how often they would be overloaded. It is hard to answer; *it occurred frequently off and on.* It would occur more than twice a day on my train, more than four or five times a day I should say” (p. 1036).

And as showing that this was done under positive instructions he further testified:

“I saw those cars being discharged before they went on the scales; not quite often, however. I received instructions from Mr. Mayer to do that” (p. 1036).

* * * * *

I received instructions from the defendant Mayer to dump a car into the bunkers before it would reach the scales. I did that. It is pretty hard to say how often” (pp. 1037-38).

And as further showing deliberation on the part of the defendants, this witness further testified:

“If my car was overloaded, I would pull the rope and let half of it go into the bunker below and then load her up again.

* * * * *

At the request of Mr. Mayer I discharged a train load of coal into one of the pockets or

compartments of the inshore bunkers without bringing it on the scales" (p. 1039).

* * * * *

I could not say how often it would occur during every week that I would open a chute attached to one of these towers, and the chute would remain open so that the coal would continue to drop along the sides of the car and into the bunkers below. It would not occur every day. Sometimes it would maybe occur more than once upon a particular day. I have myself shovelled coal that would fall from the cars into the bunkers below, and have seen other men doing it" (p. 1038).

This witness also testified that coal would frequently strike the beam already described, supporting the scales-house, causing it to fall between the cars, and that to avoid striking this beam, coal would be shovelled off the cars into the bunkers below (p. 1038).

That the temporary planking was frequently not used, is also shown by this witness who testified:

"Sometimes I saw that temporary decking removed. I remember that upon occasions inspectors in the employ of the Government would visit that dock. I never received any instructions from the defendant Mayer in connection with such visits. In relation to the inspectors, Mr. Mayer would come down and say, 'Cheese it, Joe, Look out for them; there is an inspector coming up the stairs'" (p. 1039).

As to this Griffin testified:

"The planking is placed down I suppose to save the coal from going into the bunkers. I stated that sometimes they forgot to put the planking down" (pp. 1069-70).

Again, on cross-examination, Waterdoll states that upon occasions the defendant Mayer would instruct him to run a train back to the pockets and dump it without having it weighed (pp. 1044-45).

Relative to the same matter the witness Griffin testified:

“Sometimes the cars would not be full and sometimes they would be overflowing. The overflow would be thrown off and would go down into the bunkers. * * * Sometimes a lump of coal would go into the chutes, and hold the chute open. Then the dumper would have to run upstairs and try to get the lump out. In the meantime the coal would come out, and what would not go down into the bunkers would be thrown in by the men. The coal would continue to flow into the bunkers until the lump was taken out, that is the fine coal would flow. Sometimes it would take from two to five minutes to do that. That would happen maybe two or three times a day; maybe it would not happen at all” (p. 1065).

During the street-car strike the customs-house weigher reached the dock at eight o’clock. The employees of the Western Fuel Company, however, would arrive at 7 o’clock. During the intervening hour a considerable quantity of coal would be dropped into the bunkers below, Griffin testifying:

“We were supposed to be there at 7 o’clock and as soon as we would arrive we would empty the hoppers before the weigher got there. The coal that came out of the hoppers was dumped into the bunkers unweighed” (p. 1065).

And as showing that cars were frequently discharged without being weighed, the same witness said:

“I have seen cars unloaded before the coal would be brought upon the scales. That would be done whenever they got a chance to pull the doors open. The motorman would do that under Eddie Mayer’s direction. I never pulled them open myself, but saw other men do it. I did not know of the presence of inspectors upon that dock. Eddie Mayer said when there was nobody around, ‘Dump the cars if you get a chance.’ He made that statement only once” (p. 1066).

It appears also from the testimony of this witness that the temporary planking, when laid, would subserve no beneficial purpose because the coal that would fall upon it, as well as upon the framework of the bunkers, would be shovelled into the bunkers below (p. 1066).

In describing how, upon occasions, to clean the hoppers out, coal would be discharged, without being weighed, into the bunkers, the same witness testified:

“When the hoppers are filled they would sometimes load the cars up and then open the side doors of the cars, so as to let the coal down into the bunkers below. At that time the cars would be located beneath the hopper. That was done under Eddie’s direction. No part of that coal was weighed” (p. 1073).

That cars were frequently overloaded and the coal permitted to roll off into the in-shore bunkers, was also testified to by the witness, David Powers (p. 695). And, that coal was discharged, during the

absence of the government weigher, was also established by him. Upon this subject he testified:

“On a number of occasions at noon or at five o’clock, I used to see the chutes underneath the hoppers at Mission street opened up so that the coal would run into the bunkers. At such times the Government weigher would be away eating his dinner, or if it occurred at night, he would be at home. * * * It was another common occurrence at Mission street to load up the car when the weigher had gone to lunch, pass over the scales with it, and at five or ten minutes to one, empty such car into the bunkers, then load it up again and have it ready for the weigher when he came back at one o’clock. Such car-load of coal would not be weighed at all. The defendant Mayer certainly saw these operations to which I have just testified” (p. 695).

On the Mission Street bunkers, the hoppers were operated by means of a cord which, when pulled, would open the chute cover and let the coal into the car (p. 703). As to what occurred at this place, the same witness testified:

“It was a common occurrence to see the chute thus opened and the coal permitted to run down the sides of the car into the bunkers” (p. 703).
* * *

“A number of times they used to load a car up just before the weigher would go to lunch, that is, a few minutes before 12 o’clock, and run it over the scales and back again, and switch it back five minutes to one, dump it into the bunker, and then load it up again before the weigher returned. That occurred both at Folsom street and at Mission street and was frequent” (p. 703).

It seems, too, from the evidence of this witness, that on many occasions he had conversations with the defendant, Mayer, regarding the shortweighing of imported coal (p. 708).

During the month of January, 1913, the same witness, accompanied by John W. Smith, government employee, was watching the discharge of coal on the Folsom Street bunker. About five minutes to twelve, Mr. Phelan, the government weigher, left the dock for his lunch. After Phelan had left, a train load of coal was dumped without being weighed. At this time, Mayer was acting as weigher on the dock. After being dumped, these four cars were again loaded with coal and permitted to remain until Mr. Phelan returned from his lunch, whereupon they were run up to the scales and weighed (pp. 710-11; see also testimony of John W. Smith, pp. 1007-08).

Although Edward Powers had never assisted in loading cars, at times he had seen coal running over the sides of the cars into the bunkers below (p. 868).

That upon occasions, after business hours, coal would be dropped from the hoppers directly into the bunkers below, is attested by the witness Robert Sass who was employed on one of the barges of the Western Fuel Company. He testified that:

“Twice I saw coal running out of the hopper into the bunkers after five o’clock. The work was all stopped and I was making the barge fast, tying her up for the night, and I heard the noise. It was the coal running that attracted my attention, and I looked up to the

bunker and saw the coal running out of the hopper into the bunker. It was coming right out of the hopper into the bunker. * * * I saw one hopper emptied in that way on one night, and the other hopper emptied on the next night" (pp. 1099-1100).

In fact, the activities of the Western Fuel Company in this direction must have become more or less notorious for, according to the testimony of J. T. F. Burns, a custom house employee, as far back as 1908 the Government was in the habit of sealing up the sides of the coal cars and the chutes during the night time and between 12 and 1 o'clock of each day (pp. 1158-59).

According to this same witness, upon one occasion he saw a coal car so located under a hopper chute that half of the coal went into the car, and the other half went down into the bunkers, and when the car was loaded, the next car was moved forward to the same position, with the same result (pp. 1159-60).

J. F. Barfield, an assistant weigher, upon one occasion observed an employee of the company shoveling coal from the flooring near the car tracks into the bunkers (pp. 1170-71), and assistant weigher Freund many times observed coal being shovelled from the framework or runway of the Folsom Street bunkers into the bins below, having made many reports concerning these observations to chief weigher Wooster (pp. 1175-76).

Albert E. Aitken, a ship's clerk, employed to look after the interests of the shipowners, almost daily

saw coal being spilled into the bunkers without being weighed (pp. 1187-88).

A. H. Freund, an assistant weigher, in detailing his observations concerning the shovelling of unweighed coal into the bunkers, said:

“I have many times, during the time that I have acted as assistant weigher on the Folsom Street bunker, observed coal being shoveled from the framework or runway into the bins below. I complained to the man himself who was doing that, and, another time, I told Mr. Mayer and he went down and scolded the man in my presence. The operation was not afterward repeated that I saw. I did not again see coal shoveled into the bins below on that ship, but I afterwards saw them doing that on other ships, but I cannot say how many times. I made several reports in regard to the work to Mr. Wooster” (1175-76).

Mr. Wooster was the chief customs weigher.

And in explaining why it was not possible for the assistant weigher to prevent the practices here complained of, this same witness testified:

“The weighing is more or less rapidly done. If the weigher were to turn around and face easterly, he would only be able to see the first hopper. He could not see coal being discharged from the hoppers into the cars and from the cars into the bunkers below, even though he looked easterly. There is considerable noise made in discharging the coal into the hoppers and that noise continues always” (p. 1175).

Short Weighing by Tubs.

It sometimes occurred that imported coal would be discharged at docks upon which there was no

scales-house. Upon these occasions the weight of the coal would be determined from average weights, one tub out of every fifteen, or four out of sixty, being weighed. By the average weight of these tubs, the weight of the remaining tubs of coal would be determined. It will thus be seen that if all of the tubs were not evenly filled, the weights taken would be inaccurate and misleading. In weighing out this imported coal, the tubs that were to be weighed would be very light, while those that were not weighed would be filled. This practice was just the reverse of what occurred on the barges, to which reference will hereafter be made. The effect of this practice was to underweigh the coal discharged.

According to witness, David Powers, the occurrence just described was frequent (p. 711).

Philip Ganesi, a shoveller, in referring to this practice said:

“During these four years, also, I sometimes worked in the hold of a ship that was discharging imported coal, and upon those occasions the coal would sometimes be weighed upon the decks of the ship. They would tell me then, ‘Don’t you fill too much when they are going on the scales, otherwise the Western Fuel people will get mad if you fill them up too much.’ That was in connection with the imported coal” (p. 1107).

Testimony to the same effect was given by Jim Balestra, another shoveller (pp. 1120-21); and by Tony Belish who testified:

“When a ship was being discharged over side of imported coal, the tubs that were weighed

would, a good many times, be lighter than those which were not weighed" (pp. 1137-38).

William J. Delaney, a deputy collector of customs, and who formerly had been an assistant government weigher, described the difficulty encountered by him while acting as ship's clerk in keeping the tubs evenly filled during the time a ship was discharging, stating:

"I had quite an altercation with the representative of the Western Fuel Company about the manner in which the coal was being weighed on the deck of the ship on small scales. The coal was placed upon the scales in tubs.

Q. You say it was all weighed in tubs on scales; state what if anything, you observed with reference to the discharge of that ship while you were acting as ship's clerk?

Q. Well I noticed that when a tub was called for by the United States weigher, that oftentimes it did not seem to be representative of the total amount of coal that was being discharged, and I had an altercation with Mr. Mayer, the clerk for the Western Fuel Company about his going into the hold of the ship.

Q. Do you know how long it took to discharge that ship?

A. Well about three days I think.

Q. How frequently did you notice that the tubs which were weighed by the customs weigher did not represent the average tub that was hoisted?

A. Well it did not happen very often because I did not permit it to happen.

Q. Let me ask you this specific question, Mr. Delaney; you remember the tubs that were being hoisted for the purpose of being weighed, do you not?

A. Yes, sir.

Q. Now to what extent were the tubs which were hoisted for the purpose of being weighed, filled with coal?

A. Well, sometimes they were not representative of the total number of tubs hoisted.

Q. What do you mean by not representative of the total number of tubs hoisted?

A. Well, the tub that was weighed, would sometimes not weigh as heavy as the general average.

Q. How frequently did that occur? How frequently did it occur that tubs were brought up for the purpose of being weighed which did not contain as much coal as was contained in the average tub?

A. Well this happened several times until we had a big row about it and then it stopped. I could not say the number of times that that happened" (pp. 1190-93).

Interference With Scale Rod.

That the exposed scale rod on the Mission Street dock was utilized by the defendant Mayer to short-weight the coal, was also shown. David Powers, describing this situation, said:

"Mr. Mayer used to sit right next to the rod, with his feet on the rod. I saw him put his feet up against the rod several times. He used to talk about it himself. He used to boast about how much money he was making and how he was robbing the Government and robbing these 'lime juicers,' as he used to refer to them, meaning the steamers that used to come there for the Western Fuel Company. Every time you would meet him he would tell you about how much he stole, or what he was doing" (p. 696; see also pp. 703-04).

That Mayer did interfere in this manner with the scales rod is shown by the testimony of A. H. Freund, a customs weigher. According to this witness, he and Mayer would both sit at the scales table, both facing the beam and using the table in keeping their books. Evidently being suspicious of Mayer, upon one occasion when the latter went out to give instructions to the motormen into what pockets of the bunkers to distribute the coal, Freund rubbed the rod with a piece of chalk. Mayer returned and resumed his seat. Shortly afterwards, Freund noticed the chalk on Mayers' pants and cautioned him to thereafter keep away from the rod (pp. 1173-75).

Defective Condition of Platform Scales.

In August, 1905, the steamer *Germanicus* arrived with a cargo of coal from Ladysmith, British Columbia. According to the bill of lading and invoice, she had on her, 5970 tons of Wellington lump coal. Her outturn weight was 5603 tons, or a shortage of 347 tons, 110 lbs. On account of the character of the shortage, the collector compelled duty to be paid upon the invoice weight (pp. 500-02).

On August 29, 1905, during the same month, the steamer *Dumbarton* arrived carrying a cargo from the same port. According to her invoice and bill of lading, her cargo weighed 2680 tons, the shortage being a little over 66 tons (pp. 502-04). Only a part of the cargo was discharged by the Western Fuel Company (p. 504). A few days before the

arrival of the Dumbarton, the witness, David Powers, had a conversation at Mission Street with the defendant, Mayer, in which the latter informed him that the scales would rest or be upheld by blocks or uprights underneath them so that they would not register the true weight, and that he knew all about it (pp. 703-04).

This testimony is corroborated by the witness, J. L. Bley, a custom house broker, who was representing the agents of the consignee of the cargo in the Dumbarton (pp. 1193-94). He, in company with Wooster, chief weigher, made an examination of the platform scales on the Folsom Street dock and ascertained that a part of these scales rested upon, and came in contact with one of the four uprights located underneath the scales, interfering with the weight (pp. 1194-1200). In describing this upright he testified:

“Q. Had the top of the upright which apparently had come in contact with the platform of the scales been worn down to any extent, and if so, to what extent?

A. Well, it was to some extent; I cannot recall to what extent it was worn down, but it was to some extent; that is, it was visible to the naked eye that the platform had rested on it.

WITNESS (continuing). The upright that I examined had apparently been worn down at a recent date. I remember the chief weigher contended that it must be of recent origin but my contention at the time, if I remember correctly, was that it might have been for some period past” (p. 1199).

Improper Use of Link.

The coal cars contained in each train were joined together by the use of links. As has already been shown, two cars at a time would be weighed. Upon one occasion, about 1906, a peculiar link was used between the second and third cars of one of the trains so as to throw part of the weight of second car on the third car and when on, inaccurately, and with the advantage in favor of the Western Fuel Company, weigh the coal contained in the cars (p. 1183). In describing this situation, A. H. Freund, assistant weigher, testified:

“Well, there are four cars worked up there and they are weighed two at a time; they are all linked together, one motor-car. I was weighing. * * * Having weighed the first two cars of a train, I think the weight went in the neighborhood of something like 17,500 and as they pulled off and they weighed the second two, I saw that the cars were heavily laden and I thought that there must have been something wrong with the weight, so I insisted on the motorman bringing those cars back and reweighing them.

* * * * *

I had the motorman back up his cars, and I reweighed them, and where they first weighed something short of 18,000, the next weight was about 25,500 (pp. 1183-84).

* * * * *

In taking the second weight, all cars were pushed backward and weighed in that manner” (p. 1185).

The witness then testified that he communicated with the chief weigher, Wooster, who, in turn,

brought the Fairbanks scale man to the dock. Indicating the cause of the improper weight, the witness proceeded:

“Then we discovered that there was a short link between the second and the third cars that when the first two got on, the short link in some way held the cars up a little on the scale in order to make a difference of somewhere around 2,000 lbs.

I believe this link was shorter than the links between the other cars. I examined the links myself. I should imagine it had been in service some time. I don't think it was a new link, but I didn't notice particularly” (p. 1185).

That this situation was known to the defendant Mayer was testified to by David Powers, who said:

“I had a conversation, however, with him (Mayer) regarding the link which was in use for the purpose of short-weighting coal. I have forgotten the date of the conversation, but I know that a man named Murray was then weighing coal for the Government. Murray made the blacksmith change the link and Mayer spoke about it and said, ‘Why, gee, we ain't doing a thing to these lime juicers and these other people (he meant the Government) with the bent link between the second and third cars.’ * * * Mayer told me how he was defrauding the Government with this link. * * * Mayer told me that the link was bent in such a way that it would lift a certain amount of weight off the last two cars. He did not tell me how long the link had been in use” (pp. 704-05).

Discharge of Steamship "Wellington".

Between 1904 and 1912 coal was imported by the Western Fuel Company in the steamer "Wellington". Upon her arrival at the harbor of San Francisco the cargoes would sometimes be discharged by the Western Fuel Company at its docks in San Francisco and at other times at the Howard Bunkers in Oakland. During the trial in the court below a statement was introduced in evidence by the Government showing the invoice weight of each cargo imported into this harbor on the steamer "Wellington" during the period above referred to. This statement shows the date of the arrival of the vessel at this port, the entry number, and whether she discharged short or over. A copy of this statement is found on pages 2893-94, volume 8 of the record.

A comparative statement was then introduced showing the difference between the results of the discharge of this steamer in San Francisco and her discharge in Oakland. This statement is United States Exhibit 155 and will be found at page 2896, volume VIII, of the record. Its examination will show that during these years she discharged upon 27 occasions in San Francisco. Upon 20 of these occasions she turned out short, and upon 7 occasions, over. The result of her discharge in San Francisco was a shortage of 1348 tons 2100 lbs., and an overage of 151 tons 360 lbs., or a net shortage of 1197 tons 1740 lbs.

During the same period of time she was discharged 44 times in Oakland. Upon 15 of these occasions she discharged short, while upon 29 occasions she discharged over. The result of her discharge in Oakland was 449 tons 1310 lbs. short, 1098 tons, 410 lbs. over. In other words, the net result of her discharge at Oakland was an overage amounting to 648 tons, 1340 lbs.

The facts established by this table are very significant when considered in the light of the evidence given by the witnesses touching the practices indulged in upon the Western Fuel docks in San Francisco when coal vessels were being discharged.

Discharge of Steamship "Algoa".

During the early part of 1908 the "Algoa" was utilized by the Western Fuel Company as a store-ship. Part of her cargo came from the steamship "Indra" and the remainder from the steamship "Thyra". According to the out-turn or discharge weight 6248 tons 652 lbs. of the cargo contained in the "Indra" was loaded into the "Algoa". 2170 tons 1461 lbs., according to the out-turn weight, was taken from the steamer "Thyra". According to the out-turn or discharge weight, therefore, the total coal stored in the "Algoa" amounted to 8418 tons 2113 lbs. (pp. 888-90). At this point it might be interesting to know that the "Indra" discharged short 268 tons 1868 lbs., while the discharge of the "Thyra" disclosed a shortage of 69 tons 1329 lbs. (p. 889).

After the "Algoa" was loaded, her hatches were put on and she was towed to Mission Bay (p. 889).

The "Algoa" lay in the stream for about eighteen months, by which time her cargo of coal was fully discharged. The date of her final discharge was June 29, 1910 (pp. 893-96). The total weight of the coal thus laden into the "Algoa" upon discharge amounted to 8535 tons 677 lbs., an increase of 116 tons 804 lbs. above the weight of the coal with which she was loaded (pp. 898-99). These figures are shown by the entries made in Mill's books. It also appears that between 50 and 100 tons were placed in the "Algoa's" bunkers, to replace coal used for fuel in discharging, which would proportionately increase the more. No entry of this coal was made (p. 977).

It might also be interesting to note, although this will be referred to later, that notwithstanding the weight of this coal, when discharged from the "Algoa" into the barges amounted, as already stated, to 8535 tons 677 lbs., when shortly thereafter it was delivered from the barges into the other vessels and again weighed, the record of these last weights disclosed that it had greatly increased in weight.

Import Duties Paid Upon Discharge Weight.

Although the court will take judicial notice of the fact, the evidence shows that the duties paid to the Government are ascertained and paid, not upon the invoice weight, but upon the out-turn or discharge weight (p. 136).

COMPARISON OF EXISTING SHORTAGES BETWEEN IMPORTATIONS OF COAL BY WESTERN FUEL COMPANY AND OTHER IMPORTING COMPANIES.

In the brief filed by plaintiffs in error it is asserted that if a comparison is made between the net shortage in cargoes of coal imported by the Western Fuel Company and the shortage resulting from the discharge of coal imported by other companies engaged in business in San Francisco, it will appear that such shortage is of no special significance and is unavailing as an imputation of fraud, but is the natural and expected result, considering the character of the commodity handled and the manner in which the coal is weighed on importation. The figures, however, to which resort is suggested, strongly corroborate the claim of the Government.

Preliminarily, it may be said that a general average of shortage or overage, as we have already pointed out, is not the proper method of arriving at any satisfactory conclusion as to whether fraudulent conduct was indulged in. Aside from this, however, counsel for plaintiffs in error have overlooked the exact extent of the shortage existing in the cargoes of coal imported by the Western Fuel Company from Nanaimo and Northfield. At the expense of being tedious, we recapitulate.

Taking into consideration split and partial cargoes, as well as overages, the general percentage of shortage is slightly less than one per cent. Eliminating split cargoes alone, the shortage reaches

1.07%. Eliminating overages and taking into consideration only cargoes that were short, the general shortage reaches $1/84\%$.

Directing our attention alone to coal imported from Nanaimo and Northfield, and basing our calculation upon the actual weight of the cargo as contra-distinguished from the invoice weight, the net shortage of these cargoes reaches 2.2%. Incidentally in passing, we might also observe, as has heretofore been emphasized, that if we consider the actual weight of cargoes of coal imported from these two last mentioned places, practically all of the overages occurring at the point of discharge will disappear.

There are other circumstances too, which are entitled to consideration in making the comparison suggested. In reaching San Francisco Australian coal is on the water approximately 5 weeks, and during this trip passes through the tropical heat of the equator. If there is any merit in the claim of the experts that coal after it is mined, under certain circumstances will distill moisture, this journey, under the conditions pictured, might account for some shortage. On the other hand, British Columbian coal is on the water only 4 days, and, as Professor Branner, says:

“Q. Now, assume that a cargo of coal was placed upon a ship at Nanaimo and transported to San Francisco and the coal is four days in transit to this port, and assume that the hatches of the vessel are closed in transit, in your opinion would there be any appreciable diminu-

tion of the weight of that coal during that period of time?

A. I should not think so.

Q. And, in your opinion, would there be any appreciable increase in the weight of that coal during that period of time?

A. Not if it is kept dry.

Q. The oxidation during that period of time would be practically nil, would it not?

A. It would amount to but very little, indeed.

Q. It would be negligible, would it not?

A. I think so'' (pp. 1822-3).

Again, in the discharge of Australian coal, the consignee from whom the Western Fuel Company purchased the cargo was always represented by a ship's clerk who, as best he could, would see that the cargo was entirely weighed. Of course, his abilities in this regard were limited and circumscribed by those obstructions which prevented the Government weigher, had he so desired, making the necessary observations to protect the Government against loss. If, therefore, Australian cargoes of coal could be discharged with but little, if any, shortage, after a lengthy journey, it must be apparent that at least no greater shortage should exist in cargoes imported from British Columbia.

Result of Discharge of Imported Coal, Incorrectly Stated.

On pages 44 and 45 of the brief filed by plaintiffs in error, a purported result of the discharge of imported coal by various concerns, including the Western Fuel Company, is stated. Upon these comparisons, an argument is made that the shortage

in the Australian cargoes discharged by the Western Fuel Company compares favorably with similar cargoes discharged by other concerns. Among the shortages cited, however, are the following:

“Net shortage on Australian coal,
March to September, 1907, dis-
charged by Southern Pacific Co., 8/100%
(meaning 8/100th of 1%)

Net shortage on Australian coal, No-
vember 1907-April 1910, discharged
by Hind, Rolph & Co. 3-4/100%”

This last figure, if correct, would tend to show a general average of shortage tremendously in advance of any shortage that could be imputed either to the Western Fuel Company or to any of the other discharging companies. An examination of the transcript, however, will show that remarkable as it may seem, Hind, Rolph & Co., although personally discharging only three cargoes, always discharged well over, a powerful circumstance considering the record in this case attesting the honesty and integrity of this firm. According to the bill of lading weight, their cargoes aggregated 16,417 tons. Upon discharge, the out-turn or custom weight indicated 16,975 tons 58 lbs. Instead of their being any shortage in *any* of these cargoes, there was an overage of 558 tons 58 lbs. equalling 3-4/100% (p. 2043). This overage would tend to indicate that the cargo loaded into vessels in Australia at least equalled the bill of lading and invoice weights.

The Southern Pacific Co. likewise discharged over, instead of under. But one shortage existed in the cargoes discharged by it. The bill of lading weight of the cargoes discharged aggregated 26,090 tons. The discharge weight was 26,111 tons 1998 lbs. The general overage (instead of a shortage) was 8/100% (p. 2043).

In justice to counsel representing plaintiffs in error, we believe it proper to state that they were evidently misled by the summary printed on page 2045 of the record, which, so far as the Hind Rolph Co. and the Southern Pacific Co. are concerned, incorrectly shows the overage to be a shortage.

The court might also consider the table showing discharge of split or partial cargoes (p. 2044). There the bill of lading weight represented 144,972 tons, the out-turn weight 145,011 tons 911 lbs., resulting in a net general overage of 27/1000%.

Nor can the weighing on a rising beam be charged with the shortage complained of—an advantage of ten or twenty pounds in every long ton is insignificant, and its effect vanishes in the coal dust that travels with the winds as they sweep by the scene of operations.

BRANCH OF CASE RELATING TO FRAUDULENT DRAW-BACK CLAIMS AND FRAUDULENT CONDUCT COMMITTED IN FURNISHING COAL TO TRANSPORTS AND OTHER GOVERNMENT BOATS.

Under the laws and regulations of the United States, where coal imported into this country, upon

which duty has been paid, is subsequently delivered to vessels engaged in foreign trade, flying the American flag, to be used by them as fuel, upon the presentation of proper claims commonly known as draw-back claims, supported by proper affidavits showing the importation of such coal and the payment of duty thereon, the owner of the vessel or vessels to which the coal is delivered is entitled to have refunded to him the duty previously paid upon the coal thus delivered. It is obvious, therefore, that the coal thus supplied to these vessels should be accurately weighed, to the end that the Government may not be required to refund any amount in excess of the sum actually paid as duty upon such coal.

In this portion of our brief we will undertake to point out to the court a part of the mass of evidence introduced during the trial in the court below, establishing beyond the shadow of a doubt that as a result of the conspiracy alleged in the indictment, draw-back claims were presented against the Government, upon which it refunded moneys purporting to represent moneys previously paid upon imported coal laden into American registered vessels engaged in trade with foreign countries, to be used as fuel, which, in fact, had never been paid, and that accounts were presented to and collected from the Government representing coal claimed to have been delivered to transports and other Government vessels, with which, in fact, they had never been supplied.

It is the claim of the Government, substantiated, as we will show, by affirmative and conclusive proof, that this situation was brought about by making and keeping false weights and returns of weights of coal supplied to these vessels, making it appear that larger quantities of coal were delivered to them than in fact they actually received.

METHOD OF COALING SHIPS.

While the various steps taken in coaling vessels will hereafter be described in detail, we believe it proper at this point to very briefly indicate the *modus operandi* by which the coal would leave its original place of discharge and finally find its way into the bunkers of the vessels to which it was supplied.

All of the vessels with which we are here concerned were supplied with coal by means of barges. When the Western Fuel Company first went into business in January, 1904, it was the owner of two barges. The remaining barges used by it in connection with its business were owned by the Western Transport Company. In July, 1904, one-half of the stock of this company was acquired by the Western Fuel Company, the other half standing in the name of Mr. Dunsmuir. The defendant John L. Howard was the president of this company; the defendants James B. Smith and Joseph L. Schmitt were directors. D. C. Norcross was its secretary. In 1907 the stock held by Dunsmuir was purchased

by the Western Fuel Company, it thus becoming the absolute owner of all of the capital stock of this subsidiary company. At a later date, the ownership of all of the barges was transferred to the Western Fuel Company, the Western Transport Company going out of business (pp. 231-233, 252).

In this connection, it might be proper to state that for carrying coal the Western Transport Company received 50 cents a ton, which was estimated on the weight of the coal, ascertained at the point of delivery from the barges to the vessels coaled by them (p. 233). The calculations were based upon delivery tags furnished by the defendant Mills, the figures upon which coincided with the entries in his books (p. 233).

The barges used in coaling ships would invariably take their coal from the pockets of the off-shore bunkers. At times they would take coal already deposited in these pockets by cleaning the pockets out; at other times, while a ship in which coal had been imported, was discharging, a pocket would be opened, and as the coal was dropped into the pocket from the cars after having been weighed, it would be discharged directly into the barge. Upon very infrequent occasions, a small quantity of coal was taken from the yard of the Western Fuel Company by means of dump-carts and deposited upon a barge. After the barge had received its cargo, it would be taken to the particular vessel, to the bunkers of which, coal was to be supplied. The coal would then be raised in buckets by means of a

hoist and dumped on to that part of the vessel immediately opposite the bunker holes through which the coal would be permitted to fall into the bunkers being filled. As the coal was taken from the barge in buckets, as will hereafter be shown, average weights would be taken. Upon these weights, the coal would be paid for by the owner of the vessel, and based upon these identical weights, draw-back claims would be presented. This same procedure would be pursued in supplying coal to transports and other Government vessels.

THE RECORDS OF THE WESTERN FUEL COMPANY THEMSELVES SHOW SALES OF IMPORTED COAL GREATLY IN EXCESS OF THE COAL RECEIVED.

If the claim advanced by the Government with respect to the second branch of this case is well founded, that is, that the alleged deliveries of coal to vessels having the right of draw-back, and to transports and other Government vessels were largely in excess of the actual and true weight of the coal thus delivered, it would necessarily follow that the records of the Western Fuel Company would show that it had apparently sold an amount of coal largely in excess of its actual or true weight. And logically, if, under the circumstances, the records of the Western Fuel Company show that although receiving only a certain quantity of coal, it nevertheless had sold a much larger quantity, that fact should be a controlling circumstance in connection

with other evidence tending to establish that the selling weights of its commodities were inaccurate, false and fraudulent. We have already shown that on April 1, 1906, the amount of foreign coal on hand was 25,258 tons (p. 2687). This was made up from a statement showing that on that date there were 12,748 tons 1022 lbs. located at San Francisco depot and 12,510 tons 40 lbs. located in the Oakland depot (pp. 130-3). According to the undisputed testimony of Norcross, this was all of the foreign coal in the possession of the Western Fuel Company on that date (p. 134). Between April 1, 1906, and December 31, 1912, including the coal on hand April 1, 1906, it had received from all sources, according to the out-turned or ascertained weight, being the weight upon which duty was paid, 2,138,831 tons 473 lbs. (pp. 2687; 2728).

Each month while engaged in business, the Western Fuel Company kept what is known as a monthly statement of coal received. One statement would relate to the Oakland depot, the other to the San Francisco depot. According to the witness Norcross, all coal received by it from all sources would be entered in either one of these two statements, he testifying:

“Q. Each of these statements indicating coal received at Oakland during a given month does show all of the coal received at the Oakland Depot for that given month?

A. That is right.

Q. Including all foreign coal?

A. Yes.

Q. And each of these sheets purporting to show coal received at San Francisco for each particular calendar month does show all of the coal received by the Western Fuel Company in San Francisco?

A. Yes.

Q. So that both of these sheets together do show all of the coal received by the Western Fuel Company in the State of California for each given calendar month?

A. Yes'' (pp. 135-6).

So far as imported coals were concerned, these monthly statements designated their quantities according to the out-turn or discharge weight, that is, the weight upon which duties were paid.

Upon this subject Mr. Norcross testified:

“Q. So far as the imported coals are concerned, the weights are based not upon the invoice or bill of lading weight, but upon the custom-house weight or ascertained weight?

A. Upon the custom-house weight'' (pp. 137-8).

(See also p. 141.)

These are the weights upon which the Western Fuel Company purchased and paid for the coal (pp. 138-9).

The weights of foreign coal shown by these statements to have been received by the Western Fuel Company between April 1, 1906, and December 31, 1912, corresponded with Table “A” United States Exhibit 125 prepared by Mr. Tidwell, excepting with respect to certain overages appearing on the face of the statements, to which we will hereafter

refer. During this same period of time, the Western Fuel Company kept in each of these depots a monthly record of all coal sold by it. These records taken together show all coal, including foreign coal, sold by it in California between April 1, 1906, and December 31, 1912, and likewise show the amount of coal on hand on December 31, 1912 (pp. 148; 183-5). From these records, the accuracy of which was not disputed, Special Agent Tidwell prepared a table showing the total quantity of imported coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, the quantity of imported coal then on hand, and accounted for 326 tons of foreign coal which had been burned during the month of October, 1908 (pp. 314-15). This table is found on pages 2730 and 2732, volume VIII of the record.

An examination of this last table will show that, including coal on hand December 31, 1912, and the 326 tons of coal burned, according to the records of the Western Fuel Company, between April 1, 1906, and January 31, 1912 (both dates inclusive), it had sold 2,200,827 tons 1847 lbs. of imported coal, or 61,996 tons 1374 lbs. in excess of the amount purchased and received.

Upon these figures, as to which there is no dispute, if the ascertained or out-turn weight upon which duty was paid, was correct, and the wholesale selling price of this coal, as the evidence shows, was approximately \$6.50 a ton (p. 493), the profit derived by the Western Fuel Company as the result

of the fictitious and false weights upon which its foreign coal was sold, amounted to \$402,779 (p. 493).

**ACTUAL OVERAGE AFTER TAKING INTO ACCOUNT SHORTAGE
UPON IMPORTATION.**

In the statement of the first branch of the Government case it was pointed out that the difference between the invoice weight of cargoes of foreign coal imported into the United States, discharged by the Western Fuel Company, and the out-turn or ascertained weight, amounted to 20,720 tons 674 lbs. Upon this quantity of coal, the Government was defrauded out of import duties.

From the general overage of 61,996 tons 1374 pounds shown by the records of the company should be deducted the amount of shortage above stated because this quantity of coal was actually received by the Western Fuel Company, although unaccounted for in the payment of duties. If we deduct from the total overage, this shortage, there still remains a net overage of coal sold above the invoice weight of cargoes received, of 41,276 tons 700 pounds.

While this general overage covers its entire business so far as foreign coal is concerned, the record shows that the overage from the barges alone during this same period amounted to 33,223 tons 542 pounds (pp. 1204-5). That this fictitious or apparent excess of coal was due entirely to the fraudulent practices of defendants is conclusively shown.

ALL COAL DEPOSITED IN POCKETS OF THE OFFSHORE BUNKERS WAS ACCURATELY WEIGHED AND ITS POUNDAGE KNOWN.

We have already shown that no vessel was discharged opposite the offshore bunker, and that if coal was permitted to drop from the hoppers or over the sides of the cars when loaded, it would descend into the pockets of the inshore bunker. These facts, considered with the other evidence showing that the coal deposited in the compartments of the offshore bunker had gone on the scales and been weighed, should itself be sufficient to establish that all coal in the offshore bunker had been weighed. The testimony, however, demonstrates this almost to a mathematical certainty.

G. L. Hahn had been employed by the Western Fuel Company as an assistant weigher on the Folsom Street bunkers, his immediate boss being the defendant Mayer (pp. 262-263). According to him, a complete record was kept of all of the coal that went into each pocket of the offshore bunker. Upon this subject he testified:

"They always try to keep a record of what particular compartment or pocket in the offshore bunker the coal they have weighed is discharged into. I keep that record in my book. Only coal that is weighed goes into the offshore bunker,—that is, so far as I am concerned. Whenever coal is to be deposited in any of the pockets of the offshore bunker, it is first weighed and then dumped into the particular pockets or compartments. The weight of the coal which goes into the particular compartment or pocket of the offshore bunker is recorded in

this book by me. If coal was on the ship first, it would be weighed before being placed in the compartments or pockets of the offshore bunker. Sometimes coal that goes into the offshore bunker comes from the yard and sometimes from the ship. When it comes from the ship it invariably goes over the scales first and is weighed. A record is kept by me of the weight of this coal. This record shows me the particular compartments or pockets into which the coal thus weighed was dumped. The coal which comes from the yard is also weighed before being dumped in the offshore bunker; so that, as far as I know, all coal, whether coming from a vessel or from the yard, is first weighed before going into the pockets or compartments of the offshore bunker, and the weights are recorded in a book with reference to the pockets" (pp. 262-263).

David G. Powers, who had likewise been employed by the Western Fuel Company for some years and who succeeded his brother, Edward Powers, as assistant dock superintendent, also testified:

"I sometimes acted as assistant to Mayer in loading coal into the barges at Folsom Street after I left the Pacific Mail Steamship Company. This was only occasionally to relieve Mr. Mayer when he was at Mission Street. Upon such occasions I would handle the discharge of the coal into the barges myself. I certainly would check off the weight of the coal discharged into the barges. We weighed the coal and kept track of every pocket. We weighed the coal into the cars and kept track of the pockets and the trainloads that were emptied into said pockets. All the pockets were numbered. The engineer in charge of the train would get his orders as to what pocket to put the coal into from the weigher in the scale-house" (p. 702).

And according to secretary D. C. Norcross:

“Coal which finally finds its way into the offshore bunker has already been on the scales and has been weighed” (p. 246).

The testimony of the witness Waterdoll is likewise in point upon this subject-matter. He saying:

“I am familiar with the place upon those bunkers where coal was discharged after it was weighed. * * * When coal was discharged into these cars and brought over to the scales and weighed, it would sometimes be carried to the pockets of the offshore bunkers and sometimes to the yard pockets. I got my instructions where to discharge coal from Mr. Mayer. He would indicate to me which particular pocket of the offshore bunker to put the coal in. I would follow the instructions given me by Mr. Mayer. * * * (p. 1035).

Aside from this testimony, however, as has already been shown, it appears that it was the custom of the Western Fuel Company to keep a daily record of each ship that was discharged, showing the quantity of coal discharged each day and its several places of distribution. One of these records was identified by the witness Hahn, who in connection therewith testified:

“The weights that I got were first recorded in a tally book. From that tally book some person (at the end of the day) compiles the records, a sample of which is now shown me. I turn my accounts over to Mr. Mayer at the conclusion of the day’s work, and these daily report sheets—one of which is now shown me—are compiled by him from those records” (pp. 263-264).

It was admitted that the sheet referred to was one of a series of sheets similar in kind, filled out each day at the Folsom Street dock (p. 264). The document referred to is found at pages 2675 and 2685, volume 8 of the record.

This record shows the amount of coal in tons and pounds, discharged daily by each hoist, and its exact destination. It shows every pound of coal deposited in the offshore bunkers. It also shows the deposit of some of the coal upon certain barges, which was accomplished by opening up one of the pockets of the offshore bunker, thereby permitting the coal as it was dropped into the pocket to empty into the barge (p. 865). According to defendant Mayer it represents to a pound the disposition of each cargo of coal (p. 2008).

That the weight of the coal in these compartments of the offshore bunkers was both ascertained and known, was also shown by the evidence of defendant Mills, who in testifying that it sometimes occurred that boats and other craft received their coal direct from the offshore pockets, said:

“Q. What is the fact in regard to the coal-
ing of vessels directly from those offshore
pockets?

A. Well, we always weigh the coal when it is deposited in the offshore pockets, keeping a record of the weight of those pockets, and if a ship comes there, we give them that pocket and charge it up according to the weight that has gone in there” (p. 2103).

Upon this same subject the defendant Mayer, who kept track of weights upon the offshore bunkers, testified:

“When I am checking a ship I tell the men who run the cars to put such and such coal in Number 6 pocket or Number 8 pocket, or Number 10, as the case may be, and make a memorandum thereof on top of the list that I am working on. I do not in my office keep a record of the exact quantity of coal deposited in each one of these pockets. When the pockets are originally filled direct from the steamer I keep a memorandum, but I cannot always tell how much coal is in those pockets when they are partly tapped out.

Q. I know, but when a vessel is discharging you direct the men into what pockets to deposit the coal, do you not?

A. Yes, sir, but that coal is there to sell.

Q. And you keep a memorandum of the exact quantity of coal deposited from that particular ship into these several pockets, do you not?

A. Yes, sir (p. 2001).

* * * *

Q. Does not your memorandum show the amount of coal deposited in each offshore pocket?

A. Yes, sir, but it is all charged to the offshore pockets.

Q. But does not your memorandum show the number of the pocket?

A. My memorandum does, yes” (p. 2002).

It seems that from time to time screenings would be deposited in the offshore bunkers. The defendant Mayer undertook to claim, but, as his cross-examination will show, without very much success, that upon a number of occasions these screenings

were not weighed (pp. 2010-2017), although he finally admitted that he would give instructions to put chalk marks on the cars carrying the screenings, indicating the number of loads deposited in the offshore bunkers, "just simply for curiosity" (pp. 2013-4). This testimony, however, was directly contradicted by the witness Mills, who followed Mayer upon the stand and who heard his testimony, Mills testifying:

"The largest proportion of the screenings of the Western Fuel Company since the fire of 1906 have gone into the barges. I should say also that account has been kept of the majority of the screenings thus delivered. It occasionally happens that screenings go into the barges without being weighed. I should think that would happen possibly 6 or 7 times a year. Screenings are never sent into the offshore pockets to be deposited or retained there unless they have been weighed" (p. 2101).

Irrespective of this testimony, however, when the court comes to examine the books kept by the defendant Mills, to which we will hereafter advert, it will see that every pound of coal taken off the vessel in which it was imported is accounted for, including screenings, when screenings were placed upon a barge or dumped into the offshore bunkers.

While, referring to the offshore and inshore bunkers, ordinarily the Folsom Street bunkers are directly referred to, this evidence applies equally to all of the bunkers utilized by the Western Fuel Company in the discharge and distribution of imported coal.

EXACT WEIGHT OF COAL LOADED INTO BARGES FROM OFFSHORE BUNKERS, ASCERTAINED AND KNOWN TO DEFENDANTS.

As we have already pointed out, the steamships, transports and Government boats with which we are here concerned were loaded by means of barges, into which the coal would first be checked and in which it would be carried to the particular vessel to which it was to be delivered.

The large bulk of the coal thus received by these barges for the purposes indicated, in fact practically all of it, came from the pockets of the offshore bunkers. An appliance known as a conveyor was located on the offshore bunkers, which could be moved to the mouth of each of its pockets. As soon as it was set, the chute was opened and the coal permitted to descend through the conveyor into the hold of the barge (p. 693). In order that the company might keep an accurate set of records, it was of course essential that the barges should be charged with the actual weight of the coal received by them. As no new weight was taken when the coal was discharged into the barges, the record showing the weight of the coal deposited in the pockets discharged, would represent the weight of the coal laden upon the barge. It was for this reason that an accurate weight of the contents of each pocket of the offshore bunkers was kept and recorded. And that such weight represented and was in fact the true weight of such coal, was recognized, not only by the defendants but by every official and employee

of the Western Fuel Company. This situation is clearly shown by the evidence. Upon this subject the witness Hahn testified:

“It sometimes happens that while a boat is discharging into these hoppers opposite the ship and located over the inshore bunker, there is a barge loading at the offshore bunker. The coal discharged into the barge is taken from the pockets or compartments of the offshore bunker. It is done in this way: Take for instance pocket 17, there may be 50 tons in that pocket, and we are going to feed the barge from that pocket. We empty the 50 tons out on to the barge. We have a record of how many tons there are in the pocket, also the pounds. If you wish to get 100 tons of coal upon a particular barge, and there are only 50 tons in a particular pocket, you empty out that coal first, and then bring more coal into the pocket, and from the pocket on to the barge” (pp. 266-267).

The witness was here describing an occasion when the coal in the pocket would be discharged into the barge, the mouth of the pocket left open and additional coal dropped into the pocket, which was then permitted without interruption to descend into the barge.

For four years prior to July, 1911, Edward Powers had been assistant dock superintendent under the defendant Mills. For a year prior to that time he had been a hatch tender, and before that had been employed in other capacities (pp. 855; 857; 860; 869). Touching the weight of coal discharged into barges, this witness testified:

“Q. So far as the coal contained in the pockets of the offshore bunker is concerned,

what knowledge have you upon the subject, as to whether the coal had or had not been weighed?

A. It had been weighed.

Q. It had been weighed?

A. To the best of my knowledge.

Q. Well, now, from whom would you get the weights of the coal that came out of the offshore pockets, or pockets of the offshore bunkers?

A. Edward Mayer.

Q. The defendant Mayer?

A. Yes.

Q. Did he ever at any time tell you—did he ever tell you that the figures which he gave you representing the weight of the coal coming out of the pockets of the offshore bunker, were not correct?

A. He did not.

Q. What statement, if any, did he make regarding the accuracy of those weights?

A. He just left the weights on the desk and walked away.

Q. By the way, when a barge would go over there ordinarily for coal to the offshore bunker, would they clean out a pocket?

A. Yes.

Q. By the way, do you know how much coal would ordinarily be contained in each pocket or compartment of the offshore bunker on the Folsom Street dock?

A. They were different.

Q. You say they were different?

A. There were different amounts.

Q. What would be the approximate weight for one pocket, as an average?

A. 45 tons, or 50.

Q. And they run up, sometimes, to 70 tons?

A. I think so.

Q. When a barge, for instance, would want 500 tons of coal, would you, or rather, in loading that quantity of coal upon the barge, would you

discharge one pocket after the other, until you got approximately that amount, or until all of the pockets that were open were discharged?

A. I believe they would tell Mayer what pockets to put into the barge.

Q. *And you would get the exact weight of the coal contained in those pockets?*

A. Yes.

Q. When the coal was discharged from a ship which was discharging at the Folsom Street dock, or at any other dock, would the coal first be weighed before you would get it?

A. Yes" (pp. 876-877).

This witness also testified that whenever a barge would be loaded from one of the pockets of the offshore bunker, *the pocket would be entirely cleaned out*, and that when coal was being directly discharged into a barge by means of a pocket, it first went upon the scales and would be weighed (p. 878).

The witness David G. Powers also testified:

"When I was assistant to the defendant Mills I frequently attended to the coaling of the barges and I often accompanied a barge over to the Folsom Street dock for the purpose of taking on coal. I would get the weights of the coal from the weigher, Mayer. *I always cleaned a pocket out when we were loading a barge from the offshore bunkers. A barge would be charged exactly with the weight of the contents of the pockets.* The weights would be given to Mr. Mills by the defendant Mayer" (pp. 701-702).

See also testimony of L. C. Mills (p. 2103).

As to this matter, the witness Edward Powers testified:

"Sometimes the barges which would coal vessels would get their coal direct from a steamer,

sometimes from the yard, and sometimes from the offshore and inshore pockets. The pockets would be weighed. I believe the coal would also be weighed when it would be brought to us in carts. On those occasions it would be weighed on the Miller scales, which were located in front of the office at Steuart and Harrison. *With the exception of a very few instances the coal which went into the barges was weighed before it reached the barges, so that I would know the exact quantity of coal that was checked into the barge.* It was not a general practice to bring coal from the yard to the barge. That was done on infrequent occasions. That yard was located on the opposite side of the street. When coal was brought from the yard to a barge, it would be weighed over the track scales of the Western Fuel Company, and a record would be kept of that coal; *so that the weight of the coal would be taken whether it came from the inshore bunker by cart, or from the yard by cart, or directly over the side of a ship, or from the pockets of the offshore bunkers*" (pp. 865-866).

And again:

"Q. During the time that you were assistant to the superintendent, keeping the records, and furnishing the defendant, Mills, with reports from time to time, of course you knew, did you not, the exact quantity of coal which was checked into the barge, and the exact quantity of coal that was checked out of the barge?

A. I did, by the reports that were given to me.

Q. By the reports that were given to you?

A. Yes.

Q. And you knew, did you not, that at least in a great number of cases, there was more coal taken out of the barge, so far as weight was concerned, and so far as your records were concerned, than was put into the barge?

A. So far as the records were concerned, yes'' (pp. 873-4).

Norcross himself admitted that reports showing the coal discharged and taken out of barges would be sent to his office and given to the defendant, James B. Smith (pp. 200-2-3).

Whatever doubt, however, may have been created by the uncertain and equivocal testimony of the defendants, Mayer and Mills, upon the subject of keeping records of weights, both of whom realized that if the weights of the coal with which the barges were charged were accurate it would be futile to attempt to account for the overage developed at the point of discharge, for the reasons assigned by the experts, such doubt was dispelled and the atmosphere clarified by the testimony of A. J. Schultz, foreman of stevedores for the Western Fuel Company, who, upon cross-examination, when testifying on behalf of the defendant, said:

“When I was discharging coal from the pockets of the bunkers into my barges, *Mr. Mayer would tell me how much coal was in the pocket if I requested him. He gave me generally on a blank card the number of the pockets. Sometimes Mr. Mills does that.* Sometimes they also give me a memorandum showing the amount of coal I am to discharge; sometimes they do not. It is very seldom that I receive such a memorandum, however. *We have a certain book relating to the offshore pockets showing the amount of coal in each pocket. I could see that book if I asked for it. It is kept either by Mr. Mayer upstairs or in the office. Mr. Mayer usually keeps it upstairs because he*

makes notes in it as he fills the pockets. I have also seen that book in the weighing office and have seen Mr. Mills take it up occasionally to look for certain pockets'' (p. 1345).

The failure of defendants to produce this book, or account for its absence, is at least significant.

As the exact quantity of coal contained in each pocket of the offshore bunker was known, and as in each instance when coal would be taken from a pocket of the offshore bunker by a barge, the pocket would be cleaned out, and as in the few instances when coal would be supplied to barges from the yard or inshore bunkers it would first be weighed, it necessarily follows that every time a barge took coal its *exact weight* was known to the Western Fuel Company and those of its employees who supervised this branch of its business.

Without reference to this explanation, however, it must be apparent that as a matter of bookkeeping, the exact weight of all coal checked upon barges from the wharf bunkers and the yard, were kept. That was the branch of the Western Fuel Company over which Mills had no jurisdiction. When coal was discharged into the inshore bunkers or the yard, that branch of the business was charged by Mills with receiving this coal. If any part of this coal found its way back into that part of the business controlled by Mills, the records of the Western Fuel Company would necessarily have to show that fact.

**BOOKS KEPT BY DEFENDANT MILLS DEMONSTRATE THE
TRUE WEIGHT OF COAL LADEN UPON BARGES, AND THAT
THE WEIGHTS OF COAL DISCHARGED FROM THE
BARGES WERE FALSE AND FRAUDULENT.**

Each day as foreign coal would be discharged from a ship, whether located at the Folsom Street dock, the Mission Street dock or elsewhere, a complete and detailed statement would be prepared by the defendant Mayer, and by him furnished to the defendant Mills, showing the quantity of coal discharged on that particular date and the place, or various places, where such coal was finally deposited. If a portion of the coal discharged had been transmitted to and deposited in the yard of the Western Fuel Company, that fact, with the recorded weight of the coal, would be given. The weight of that portion of the weighed coal which went into the inshore, or wharf bunkers, would also be furnished. The same would be true of the offshore bunker. And if a portion of the coal was discharged through a pocket of the offshore bunker directly upon a barge, or brought from the yard or wharf bunkers, which was very seldom, information of that fact would be given Mills, together with the weight of the coal taken into the barge.

In addition to these records, however, as has already been shown, the defendant Mayer kept in his office on the bunkers a detailed statement, showing the exact weight of the coal deposited in each pocket of the offshore bunker, so that if a barge desired a particular amount of coal, upon applica-

tion to him a particular pocket would be tapped and, as already testified to, would be cleaned out.

From the records thus furnished to him by the defendant Mayer, the defendant Mills kept in his own office a diary, in which he entered on each day the name of the ship discharging, the quantity of coal discharged, its destination, and the weight of the coal deposited in the inshore and offshore bunkers or upon the barges of the Western Fuel Company. These diaries in and of themselves furnish convincing and unanswerable proof of the guilt of defendants.

EXPLANATION OF ENTRIES CONTAINED IN BOOKS KEPT BY DEFENDANT MILLS.

Because of the importance of the entries contained in the diaries thus kept by the defendant, Mills, it is essential that a very brief explanation be made of the system pursued by him in keeping these books.

Preliminarily it may be said that they account for every pound of imported coal discharged by the Western Fuel Company and its primary distribution (pp. 317-436). As was heretofore pointed out, the local trade was supplied from its inshore bunkers (also known as wharf bunkers) and its yards. With this branch of the business, neither the defendant Mills nor the defendant Mayer had any concern. So far as this particular department of the company's business was involved, their duty ended when they

accounted for the weighed coal discharged into the wharf bunkers and yards. But, for the coal deposited in the offshore bunkers or laden upon barges, the defendant Mills was responsible until it reached its ultimate destination, which would be the vessels to which it would be sold and delivered.

An examination of these diaries, among other things, will show that in them accounts were kept and entries made disclosing the following facts:

1st. The name of each vessel carrying foreign coal, discharged by the Western Fuel Company.

2nd. The weight of all coal discharged each day from these importing vessels determined, however, by the out-turn or ascertained weight, and the out-turn weight of the total cargo when the discharge was completed.

3rd. The particular portions of the plant of the Western Fuel Company in which the coal thus discharged would be distributed after it had been weighed, including the out-turn weight of the coal deposited in each place.

4th. The weight of the coal checked into or laden upon the barges of the Western Fuel Company, and the names of such barges.

5th. The claimed weight of the coal discharged from the barges and delivered to the vessels supplied with coal.

6th. The character of the coal going into the barges, and if screenings, the exact amount thereof by tons and pounds.

7th. The number of the voyage of the ship in which the coal is imported.

8th. The names of the vessels supplied with coal and to which the coal would be delivered.

The entries will also show the invoice weight of each cargo of imported coal, and when the out-turn or discharge weight has been ascertained, whether the cargo ran "short" or "over," and the respective amount of such shortage or overage.

The barges would be charged with the out-turn weight of the coal, that is, the weight ascertained at the time the imported coal was being discharged from the vessel in which it was brought here. As against this intake or charged weight, the barge would be credited with the amount of coal taken out of her and discharged into vessels to which coal would be delivered. These credits were derived from records of weights kept while the coal was being discharged from the barge into the vessel being coaled. When the barge would be finally cleaned out, that is, when all of the coal laden upon her was finally discharged, a computation would be made between the amount of coal received by the barge and the amount checked out. If more coal was checked out than was received, this would be designated as an overage in the books of Mr. Mills. If, on the other hand, a shortage occurred, that fact would be designated, together with the amount of such shortage. A shortage in the coal discharged from the barge, however, but rarely hap-

pens, such shortages being represented by less than 1% of the clean-ups; an overage was the invariable result, being represented by 99% of the clean-ups. The extent of these overages will be dealt with later.

That these books accounted for every pound of coal checked into and taken off of each barge is undisputed. Upon this subject Tidwell testified:

“Q. It is a fact, is it not, Mr. Tidwell, that in those books every pound of coal that finds its way into the barge is traced and found to be discharged?

A. Yes.

Q. As well as some 66 tons more?

A. Every pound that went into the barge is shown by the record. If it was taken from the yard, as I can find an instance here where coal was taken from the yard and placed into the barge—there does not seem to be one at the present time, but it will show the amount taken from the yard or any other place, both tons and pounds, tracing it down to 40 or 100 pounds” (p. 322).

By way of further explanation, it is proper to state that when a barge is loaded with coal the usual practice would be not to completely discharge her before taking on additional coal. For instance: 500 tons might be laden upon a barge; 300 tons of this coal would be discharged into a vessel. The barge would then take on an additional quantity of coal and would be discharged only in part. This system would sometimes be pursued for several weeks before the barge would be finally cleaned out and her entire cargo discharged. It would not be until the clean-up or final discharge occurred that it could be

told with any degree of certainty whether there would be an overage, and if so, its extent.

There is also another feature connected with these books which should likewise be briefly elucidated. So far as the in-take of each barge is concerned, the amount of coal laden upon her until her final discharge is carried forward from day to day. For illustration: If on the first day 500 tons were taken by her from the offshore bunker, on the second day 600 tons from the same bunkers, and on the third day 500 tons from the steamship "Thor," the third day's entries would be as follows:

Offshore bunkers	500 tons
Offshore bunkers	600 tons
Ex "Thor"	500 tons,

and this procedure would be pursued until a clean-up occurred. In other words, on the day of the final clean-up the total coal previously deposited upon the barge would be shown. So far as here out-turn was concerned, totals alone were indulged in. For instance, if on the first day she delivered 400 tons to the "Siberia" and on the second day delivered another 400 tons, the entries made on the second day would show the total delivered to that date, to wit, 800 tons. The daily discharge would have to be obtained by subtraction. For the further purpose of illustration, dealing with a concrete case, a clean-up occurred on the barge "Nanaimo" on Friday, January 27, 1911, when it was ascertained from the records showing the coal received and discharged by

her, that she had discharged 37 tons—1544 pounds more than she had received.

On February 4, 1911, she took coal from the off-shore bunkers on two occasions, and also took coal from the steamship "Thor," then discharging, which was done as has already been explained, by opening up one of the offshore pockets and letting coal drop from coal cars into the pocket, and from the pocket into the barge. She first took from the offshore bunkers

14 tons 460 lbs.

Then again from the same bunker

she took	369	"	920	"
and from the "Thor",	412	"	2090	"
	<hr/>		<hr/>	
aggregating in all	796	"	1230	"

On the same day she discharged into the Steamship "Siberia",

237	"	360	"
559	"	870	"

On February 6, 1911, without taking on any more coal, she discharged into the steamship "Siberia"

268	"	1880	"
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leaving a balance on hand of

290	"	1230	"
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This last item of discharge into the "Siberia" appears in the diary as

505	"	1340	"
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which figure represents the total coal discharged into the "Siberia" up to and including that date, the figures being carried as totals, as already explained.

If we subtract from the 505 tons 1340 lbs., representing the total coal discharged into the "Siberia" to and including February 6, 1911, the 237 tons 360 lbs. previously discharged, we obtain the net weight of the coal delivered to the "Siberia" on February 6.

On February 7, 1911, she again discharged into the "Siberia" without taking on any further coal, her total discharge being 663 tons 850 lbs. leaving a balance on hand, assuming the weights to be correct, of

133	"	380	"
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On February 8, 1911, she again discharged into the "Siberia", making a total of coal thus discharged, according to the weights kept of

775	"	1656	"
-----	---	------	---

leaving a balance on hand of

20	"	1814	"
----	---	------	---

On February 11, 1911, she took from the offshore bunkers

56	"	1900	"
----	---	------	---

from the steamship "Puritan",

560	"	1780	"
-----	---	------	---

which, with the coal already charged against her since the last clean-up aggregates

1414	"	430	"
------	---	-----	---

On the same date she again discharged into the "Siberia", making a total discharge into her of

775	"	1656	"
-----	---	------	---

and also discharged into the "Pennsylvania"

75	"	100	"
----	---	-----	---

<hr/>		<hr/>	
850	"	1756	"

or a total discharge to date of

leaving a balance to her credit of 563 tons 914 lbs. which represented the difference between the amount with which she was charged, and the amount which she was supposed to have discharged, although that quantity of coal was, of course, not on the barge.

On February 14 she continued to discharge into the "Pennsylvania" the difference between 424 " 1744 "
her total discharge to and including that date, and 75 " 100 "
which was previously discharged, viz.: 349 " 1644 "

Her total discharge to and including that date was 1200 " 1160 "
leaving a balance to her credit of 213 " 510 "

No coal was then taken out, or discharged from her until March 7, 1911, on which date she again took from the offshore bunkers 518 " 30 "
making a total receipt of coal, to and including that date, 1932 " 460 "

On that date she discharged into the "Asia" 503 " 1364 "

Her total discharge to and including that date, which included deliveries of coal to the "Siberia", "Pennsylvania" and "Asia" aggregated 1704 " 284 "
leaving a balance to her credit of 228 " 176 "

On February 8, she continued to discharge into the "Asia", making a total to and including that date, of 732 tons 604 lbs. and on March 1, she discharged the balance of her cargo into the "Asia", totaling in all, 788 " 1436 "

As the result of this last delivery, no further coal was left in her, consequently, what was known as a "clean-up" occurred.

From these figures it will be seen that upon the weights taken, she discharged 56 tons 2136 lbs. more coal than she received.

Her last day's entries are as follows:

"Thursday, March 9/11

Ex. Nanaimo Segs. Wellg. Slack Rich. a/c

	off-shore bunkers,	14 tons 460 lbs.
"	"	369 " 920 "
"	Thor	412 " 2090 "
"	off-shore bunkers	56 " 1900 "
"	Puritan	560 " 1780 "
"	off-shore bunkers	518 " 30 "
		<hr/> 1932 " 460 "

Siberia 1775 tons 1556 lbs.

Pennsylvania 424 " 1744 "

Asia 788 " 1436 " 1989 " 356 "

Over 56 " 2136 "

(See diary 1911 United States Exhibit 113.)

The same procedure would be pursued respecting the discharge of an imported cargo of coal. The quantity of coal discharged the first day is shown. On the next day an entry would be made showing the total coal discharged upon both days. To ascertain the quantity of coal discharged on the second day, the amount removed on the previous day would have to be deducted from the total discharge shown by the diary. This practice would be followed until the entire cargo had been discharged. A comparison would then be made between the invoice weight and the out-turn or discharge weight, and the overage or shortage, as the case might be, entered. In addition to the weights, entries would be made showing the various points of distribution of the coal.

During the trial in the court below, the discharge of the steamship "Thor" was traced in the books of the defendant Mills and every pound of coal that was removed from her and weighed, was accounted for. For the benefit of the jury, the figures relating to the discharge of this cargo, and its distribution, including the delivery to vessels of all of the coal which had been deposited in the off-shore bunker and on barges, were reproduced and enlarged. Upon this reproduction, Mr. Tidwell, by whom it was made, was examined at length (pp. 420-436). The reproduction of these figures was made upon large sheets used in the court below, which have been transmitted to this court, and which are available in connection with the testimony of Mr. Tidwell

relating thereto. In making this reproduction, as explained by Mr. Tidwell, entries relating to the discharge of vessels other than the "Thor" are omitted, as are also omitted entries made in the diaries being illustrated, on dates upon which none of the coal discharged from the "Thor" was laden upon barges or delivered to steamers being coaled. The purpose of the reproduction was to demonstrate to the jury that every pound of coal discharged from importing vessels was shown by these books thus kept by the defendant Mills.

TABLE DISCLOSING OVERAGES ON BARGES.

From the books kept by the defendant Mills, the consumption entries and draw-back entries, and the records of the Western Fuel Company in evidence, another table was compiled by the witness Tidwell showing all coal laden upon barges, its ascertained weight at that time, its ultimate disposition, and its alleged weight at point of delivery to other vessels. This table is found at pages 2733, 2813 and 2810, volume VIII of the record. Summaries resulting from the figures tabulated are found on pages 2811-2813, volume VIII of the record. During the trial, it developed that through the failure of Mills to carry forward balances in certain instances, the table did not correctly show the total amount of coal laden into and discharged out of these barges. Immediately thereafter, the books were again examined and the necessary corrections made. While

these corrections disclose that more coal had been laden into, and taken out of the barges than was shown by table "C", according to Tidwell, the overage or amount of coal claimed to have been discharged from the barge in excess of the amounts received was in no wise affected:

"Q. I would like to have you explain, Mr. Tidwell, very briefly, because I only want to ask you this one question on that subject, how it came about that Table C did not contain all of the deliveries of coal to the barges?

A. For the simple reason that in preparing the table, I accepted the records of Mr. Mills as being correct, and took the totals at the date of the out-turn, or the date of the clean-up, as it is called; I accepted the total receipts as being correct, and also the total out-turn as being correct, as well as the total overage.

Q. Now, let me ask you this question: Irrespective of the question of percentages, would any single one of these inaccuracies called to your attention by Mr. McCutchen, or all of them together, in any way affect the total tonnage of excess so far as quantity is concerned?

A. You mean as to the amount received and discharged?

Q. Yes, as to the amount of overage.

A. No, sir.

Q. In other words, it simply affects the percentage; is that correct?

A. The percentage on a particular barge.

Q. The percentage upon a particular barge?

A. Yes, and it would also affect the total percentage.

Q. That is, the total percentage so far as the excess quantity of coal delivered from the barges is concerned?

A. Yes.

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Q. Is it not true that none of these alleged inaccuracies in any way affects that total result?

A. None whatsoever'' (pp. 635-6).

The witness further testified that these figures in no way affected the general overage in the entire business done by the Western Fuel Company represented by the difference between the total coal received and total coal sold (p. 637).

In this table in each instance, the total quantity of coal laden upon a barge from the time she commences to take coal until she completely discharges her cargo, or, in other words, a cleanup occurs, is shown. It also shows the vessel, yard or receptacle from which the coal was received by the barge, the vessel or vessels to which the coal thus laden upon the barge was delivered, the total amount which it is claimed was discharged from the barge, the overage representing the quantity of coal claimed to have been discharged from the barge above the actual weight of the coal checked into her, the amount of coal upon which no draw-back was claimed, due to the fact that part of the coal discharged from barges was delivered to vessels not entitled to draw-backs; also the amount of coal delivered to vessels upon which draw-back claims were made and paid, and also the amount of coal which it was claimed was laden upon army transports and revenue cutters (p. 331).

The table further shows the number of the draw-back entry.

It was also testified to, as has already been shown, that the weights charged to the barges, as shown by this table, represented the ascertained weights, or the weights upon which duties were paid to the Government (pp. 331-2).

Without desiring to unnecessarily intrench upon the time of the court, we believe it proper to explain at least two of the entries appearing in this table.

The first barge referred to is the "Melrose" under date January 2, 1906. According to the table, there was loaded into her from the steamer "Tellus", according to ascertained weight, 900 tons 1336 lbs. This cargo was completely discharged into the vessel "California". According to the record of the weights then taken, as shown by the books kept by the defendant, Mills, she discharged into the "California" 909 tons 407 lbs., being over 8 tons 1311 lbs. In other words, she discharged 8 tons 1311 lbs. more than she received. Upon this entire amount a draw-back claim was presented, it being fraudulent to the extent of 8 tons 1311 lbs. (p. 2734).

The next entry to which we desire to direct the court's attention is in connection with the barge "Ruth" which commenced to take coal on March 13, 1906 (lower part of p. 2737). In this instance the barge took on coal upon a number of occasions, the aggregate weight of which was 4293 tons 1240 lbs. The places from which this coal was obtained and the exact weight of the coal, are shown. Out

of this cargo, she delivered coal to ten steamers, seven of which enjoyed the benefit of draw-back. The total quantity of coal claimed to have been delivered was 4485 tons 302 lbs., constituting an overage of 191 tons 1302 lbs.

RECORDS OF BARGE RECEIPTS AND DELIVERIES, 1904-1905.

The diaries kept by the defendant Mills introduced in evidence also cover the years 1904 and 1905. From these two diaries another table was compiled, similar in all respects to Table C. This table was United States Exhibit 130 and is found on pages 2827-2866, volume VIII of the record. During these two years 207,309 tons 952 lbs. of foreign coal were delivered to barges, and 217,354 tons 2099 lbs. discharged, resulting in an overage of 10,045 tons 1147 lbs. Upon this overage, the Government refunded duty on 6927 tons 1812 lbs. 332 tons 227 lbs. of this overage was claimed to have been laden on United States transports. The loss of the Government alone, during these two years represented by this table amounted to \$6972.63 (see pages 2865-6).

The records showing shortages from importing vessels during these two years were not introduced because they were destroyed in the fire of 1906.

INACCURACIES IN BOOKS KEPT BY MILLS IN NO WAY AFFECT RESULTS.

In the brief filed by plaintiffs in error, it is claimed that because of Mills' failure in some instances

to carry forward in his books from day to day, until an overage would be computed, the total quantity of coal received and discharged since the last computation was made, his entries were entitled to but little reliance. The claim thus made is destitute of merit. Failure on the part of Mr. Tidwell, in compiling Table "C" to take into consideration these totals, as has already been persuasively commented on, only affected the percentage of specific overage in the instance where such irregularity existed, and to a very slight, almost negligible extent, the general percentage of total overage. After it was ascertained that in some instances these totals had not been carried forward, Mills' books were exhaustively re-examined and a table prepared by the witness Costello, in which is set forth the total intake and discharge of each barge in every case where the totals were dropped by Mills. The accuracy of this table was not disputed. It appears on page 1206 of the record. The general percentage is reduced from 5.89 to 5.57.

Percentages of overage in specific cases where such percentage equalled or exceeded 9%, based on the total coal delivered to the barge, were prepared after the books of Mills had been re-examined and the table of corrections above alluded to, prepared and completed (see table of percentages, p. 1217).

This is made clear by Costello's testimony, he stating:

"None of the discrepancies or omissions to which I have testified on cross-examination,

would in any way affect the individual percentages in the cases of overages I have given as exceeding 9 per cent" (p. 1231).

**NET RESULTS SHOWN BY RECORDS KEPT BY
DEFENDANT MILLS.**

According to Table C already referred to, between April 1, 1906, and January 1, 1913, 563,759 tons 724 lbs. of coal were laden upon these barges, and 596,982 tons 1266 lbs. discharged. As corrected, they show that 595,492 tons 102 lbs. of coal were placed on the barges, and 628,715 tons 644 lbs. discharged. These corrections simply increase the quantity of coal taken on and discharged, and in no way affect the amount of overage, or the accuracy of any of the other figures shown in Table C. The general percentage of overage resulting from these figures as corrected was 5.57 per cent (pp. 1201-6).

It therefore appears that according to the weights taken at the time the coal was discharged from the barges into the vessels coaled by them between April 1, 1906, and December 31, 1912, *33,223 tons 542 lbs.* of coal were claimed to have been discharged into these vessels in excess of its actual weight. On page 2811, volume VIII, is a summary showing, by years, the apportionment of this overage to vessels without benefit of draw-back, with benefit of draw-back, and United States vessels. On page 2812 is a statement showing the amount of moneys refunded by the Government upon this

overage in excess of the duties received by it, also showing the amount paid by the Government upon these excess weights for coal supplied to Government vessels, the total amount being \$21,792.26. The court will notice that a portion of the drawback is at the rate of 67 cents and a portion at the rate of 45 cents. The first was under the Tariff Act of 1897 and the second under the Tariff Act of 1909.

On page 2813 is a grand summary showing the excess amount of coal claimed to have been discharged from barges over amount laden on same, the overage with benefit of draw-back and that without benefit of draw-back, that portion of the overage claimed to have been placed upon Government vessels, and the amount of money lost to the Government by reason of this overage.

**GENERAL AVERAGE IMMATERIAL—SPECIFIC CASES OF
OVERAGE CONTROLLING.**

As in the instances of shortages on incoming cargoes, defendants seek to shield themselves from culpability and to avoid the legal consequences resulting from their criminal conduct through the medium of a general average. It is asserted by them that because the general average computed upon the total amount of coal handled by the barges is 5.57 per cent, criminality cannot be imputed to them. To this character of argument we make the same response as was made in the case

of shortages. Here, however, the situation is greatly emphasized and exaggerated. So far as this phase of the controversy is concerned, it cannot be successfully asserted that the coal laden upon the barges was merely estimated by ship's scales, or by comparisons, nor can it be claimed that because of the length of time coal remained upon barges, by oxidation or increase in moisture content, the weight of its cargoes could have been substantially increased. Even their own experts could not account for the increase of coal located upon a barge for a few days, or for a couple of weeks, beyond $1\frac{1}{2}$ per cent. In this case, as we have already seen, according to the weights kept by defendants, coal laden upon barges, within not more than two weeks, and in many cases within a few days, would increase in weight anywhere from 3 and 4 per cent, to 20, 30 and sometimes 40 per cent.

For the purpose of convenience, after Table C had been carefully re-examined, and its inaccuracies cured, a table was prepared showing certain of the larger overages and the time intervening between two cleanups. This table will be found on pages 1217-1218 of the record. In no case where the percentage of overage was less than 9 per cent is any reference made thereto in this table. As to this the witness Costello testified:

“At the time when I was comparing the items contained in U. S. Exhibit 125, Table C, with the items contained in the books kept by defendant, Mills, I likewise compiled a table for showing overages which exceeded nine per cent in the discharge of barges.

In this table I have indicated a number of items where the percentage of overages upon the clearances of the barge exceeded nine per cent" (p. 1216).

An examination of this table will show that in a number of instances, the period of time elapsing between cleanups did not exceed more than five or six days. In this connection the court will also remember that this does not indicate that all of the coal was laden upon the barge on the first date and taken off on the last. In the large majority of these cases the coal was laden upon the barge at different dates and discharged on different dates. It was thus kept constantly in motion. Because of the frequency with which the barges took on and discharged coal it was but seldom that any particular quantity of coal remained upon the barge for any considerable length of time.

For instance only a week elapsed between two cleanups on the barge "Nanaimo" (February 3-10, 1906), and the increase in weight of the coal handled amounted to 32.5 per cent.

Again, on the barge "Ludlow", seventeen days elapsed—May 13-29, 1907, resulting in an increase of 20 per cent.

Again, the barge "Theobald", having coal on her for a period of but five days—February 13-18, 1908, had an increase of $16\frac{2}{3}$ per cent. The barge "Comanche", five days,—May 16-21, 1908, had an increase of 23.5 per cent.

The barge "Theobald", handling coal for three days—December 9-11—resulted in an increase of 42.6 per cent, and again, the same barge, while taking in and delivering coal upon three other days,—May 23-25, 1912—had an increase of 40 per cent (see table, pp. 1217-18).

It is of course not claimed that every time a bucket was weighed, false weights were taken, but that such acts were frequently indulged in, cannot be seriously denied. It is because of these instances, the result of criminal conduct due to the conspiracy alleged, that the general average is created; without them, the average, if any, would scarcely be noticeable. No rule of evidence, nor principle of jurisprudence will justify one in avoiding the consequences of a series of criminal acts, by proving that upon other occasions, criminal conduct was not indulged in.

**ACTUAL WEIGHT OF COAL ON BARGE FURTHER DIMINISHED
AND ACTUAL OVERAGE INCREASED BY ITS USE AS FUEL.**

The buckets in which the coal would be discharged from the barges were hoisted by steam engines located upon each barge. The fuel consumed by these barges, sometimes in constant action both day and night, was taken from the coal checked into and laden upon the barge. This situation is described by the witness Edward Powers, who testified:

“While coal is being discharged from a barge into a vessel, coal is of course consumed

upon the barge for the purpose of generating steam. That coal is obtained out of the hold of the barge, and is a part of the cargo of the barge.

Q. Is it or is it not a fact that all of the coal consumed from time to time upon the barges for the purpose of generating steam is taken from the cargo that is placed upon the barge, either from the offshore bunkers or from some ship or from the yard?

A. It is.

Q. Six or seven tons a day are consumed on these barges during the process of unloading. I believe the 'Melrose' consumes more coal than any of the other barges. I would say she would use eight tons a day" (pp. 976-977).

And that in the entries made by the defendant Mills in his books no account was kept of the coal thus consumed, was likewise testified to by this witness, his statement being:

"Where the records of the defendant Mills show that a certain quantity of coal was laden into the barge and a certain quantity of coal discharged from the barge, and that an overage occurs, the coal consumed by the barge is not calculated in the overage" (p. 977).

The books kept by the defendant Mills show that these barges were almost constantly in action. From time to time at least seven barges were in use (p. 121). If coal were being discharged from them only fifteen days out of each month, and about seven tons of coal consumed daily, the quantity of coal used as fuel each month in these barges would aggregate about 735 tons. As this amount of coal or whatever the quantity was, would have

to be deducted from the actual weight of the coal laden into the barges, the court will readily see that the weights representing barge overages would be proportionately increased each month, resulting in a substantial increase in the general percentage of overage. If the quantity of coal consumed for fuel on each barge were taken into consideration in estimating the overage at each clean-up and the specific percentage of overage caused thereby, the amount of overage, as well as the percentage, would be in many instances very greatly enlarged.

OVERAGES IN BOOKS KEPT BY MILLS INDICATES CLEANUP OF BARGE.

The significance of these large overages existing in concrete cases on barges was thoroughly understood and appreciated by defendants.

Realizing, therefore, how impossible it was, on any legitimate or logical theory, to account for the overages shown by the books kept by the defendant Mills, this particular defendant on direct examination undertook to claim that such overage did not indicate that a cleanup had occurred or that practically the whole of the barge's cargo had been removed (pp. 2105-6). Even if this testimony had not been contradicted, in the face of the entries contained in the books, the jury would have been obliged to reject it as entirely unworthy of belief. Whatever defendants might claim in this

regard, or whatever Mills might have testified to, the great preponderance of the evidence establishes the fact to be otherwise. The entries appearing in the books indicating overages could only have been made when the barge was cleaned out because in a number of instances the records will show that more coal would be apparently discharged out of the barge than she had received, and yet before any final entry indicating an overage would be made, additional coal would be checked in, and a larger quantity checked out.

Mr. Tidwell, an experienced accountant, in explaining an overage appearing in Mills' books, testified:

“Q. That is on the table it appears under the date of January 30th?

A. Yes, that is the date of the cleanup of the barge.

Q. Will you just indicate to the jury what you mean by the cleanup of the barge?

A. When all the coal has been checked out of the barge.

Q. And until that is done, of course, it is impossible to tell whether there is an overage or shortage upon the barge?

A. Yes.

Q. And the reason for that is that it equally occurs that the barge would take on, we will say for the purpose of illustration, 1000 tons of coal on one day and then discharge a part of that cargo and come back and take on 500 tons and then make another discharge and take some other coal on; until all of the coal was removed from the barge it would be impossible to tell there was an overage, and the quantity of overage; is that true?

A. Yes.

Q. You are testifying to that from these records, are you not?

A. The records appear to show it" (pp. 371-2; 375-6).

Secretary Norcross, thoroughly familiar with the accounts of the Western Fuel Company so understood the books of Mills:

"Q. Have you any personal knowledge, Mr. Norcross, as to when these overages are computed, either overages or underages—shortages?

A. Computed where?

Q. At what particular time; that is, as to whether they are computed at the time there is a cleanup at the barge?

A. I understand that is the way.

Q. What do you understand by the words 'cleanup of a barge'?

A. I mean whenever he has taken out the quantity that is in there; if he ever exceeds the amount he is debited with it is called a cleanup, as I understand it" (pp. 203-4).

And in stating the time when reports would be sent by Mills to Smith, he stated:

"The defendant Mills sent a daily report showing overages, whenever one occurred on one of the barges *as a cleanup*, to the defendant James B. Smith" (p. 1245).

David G. Powers, who for six months acted as Mr. Mills' immediate assistant, with reference to these books testified:

"When the barges were cleaned out Mr. Mills would figure up his books and his overs or unders, which would show on the books" (p. 701).

Edward Powers, assistant superintendent of docks for four years and who, during the infrequent absences of Mills, would make the necessary entries in his books, clearly showed that the entry of these overages indicated a cleanup of the barge, he saying:

“Q. Now, it frequently happened, did it not, or sometimes happened, that a barge would be cleaned up within two or three days?

A. Yes.

Q. In other words, that a quantity of coal would be put upon a barge, and that coal taken over to a boat and discharged into the boat, and a cleanup would occur?

A. Yes.

Q. That sometimes occurred?

A. Yes.

Q. And it is also true, is it not, Mr. Powers, that in those instances where a quantity of coal would be taken upon the barge, and the barge taken over and discharged into a boat, or boats of the Pacific Mail Steamship Company, or some other line, or that line and some other time, that a cleanup would occur, in other words, all of the coal on the barge would be taken off?

A. Sometimes.

Q. Sometimes; and it is a fact, is it not, that in almost every instance where that occurred, where coal was put into the barge and taken out within two or three days, or within a day or two and a cleanup would occur, that there would be an overage?

A. Yes.

Q. And it sometimes occurred that in some instances, at least, there would be a considerable overage; isn't that true?

A. In some cases, yes” (pp. 878-9).

And emphasizing the situation later on he said:

“Q. Did it sometimes occur—in fact, did it not frequently occur that one of the barges during the time that you were assistant superintendent, would take on coal one day, either from a vessel in which coal was being imported to this port, or from some of the pockets of the offshore bunker, and discharge that coal within two or three days thereafter?

A. Yes” (pp. 884-5).

To demonstrate the untruthfulness of the testimony given by the defendant Mills, that cleanups occurred only once every two or three years with respect to some of these barges, a number of witnesses were called in rebuttal. Among those was the witness whose testimony was last quoted, who, in rebuttal, said:

“During the time I was acting as assistant dock superintendent, the barges of the Western Fuel Company were actually cleaned of coal at least 75 per cent of the time. I personally attended to and directed the movement of those barges. It frequently happened that two barges would be coaling a Pacific Mail liner and that there would not be a sufficient quantity of coal on those barges to complete the coaling of that liner. Before any other barges would be brought to the liner, however, those two barges would be emptied to within a few scattered tubs. If we could take up a full tub, we would send it up; otherwise we would let the coal lie there” (pp. 2234-5).

E. H. Montell, an inspector who for years had been stationed on barges to prevent the transfer of opium from the liners to the barges testified:

“They would take out the coal as long as they could shovel it into the buckets without detaining the men too long. When the bulk of the coal got out, they would stop work and the barges would go away again. To the best of my judgment, I would say there would be left in the barges anywhere from five to twenty tons of coal which had not been scraped up or cleaned out. That was the situation so far as I saw it every time I had the barges in observation. In other words, this same quantity of coal still remained every time they cleaned out.

* * * * *

I cannot say that I have ever seen one barge waiting alongside for another barge to get cleaned up so that she could take her place in coaling one of these big liners, though I have seen a barge clean up and go away and another come in within an hour or two. As near as I could say, the barge thus going away would be empty” (pp. 2216-17).

And again, referring to the twenty-five or thirty tons that would be left in a barge that had been cleaned up, the witness said:

“I should say there might have been 25 or 30 tons of coal left in the barge. It was scattered along through the barge with a little amount in each end. That is where the coal would ordinarily be left in the cleanup of a barge” (p. 2218).

George B. Richardson, another customs inspector who, for five or six years had been detailed to watch the Pacific Mail steamers for opium, had occasion not only to watch the barges, but at times, after they had stopped coaling, to search them

to see that no opium had been transferred to them. As to the condition of these barges he said:

“On several occasions I would remain on the barge until she was practically cleaned out.
* * * Sometimes I would descend into the hold of those barges to make a search for opium. I generally noticed on such occasions that when the barge was about to be replaced by another barge it was practically cleaned out. There might be anywheres from two to twenty-five tons of coal scattered around, principally in the wings in little piles and in the ends of the barge. The amount of coal thus left would vary all the way from three tons to twenty-five tons. If the ship was not fully coaled, a barge, before leaving, would be practically cleaned out down to the amount I have mentioned. Sometimes I would observe barges out of which some coal had already been discharged being brought to the side of a liner, and I have observed such barges to remain at the side of the liner until they were practically cleaned out of coal” (pp. 2221-2).

Symmes H. Hunt, another inspector performing the same duties as were assigned to the last two witnesses, gave similar testimony, he testifying:

“I sometimes observed one barge, out of which coal had been taken for the purpose of coaling a liner, move away and be replaced by another barge. Sometimes the first barge would be nearly cleaned out, and at other times, she would have perhaps from 100 to 150 tons of coal left aboard. *I have seen the barges cleaned out many times. Before another barge would be brought alongside, the first barge would be cleaned out*” (p. 2224).

One of the engineers and some of the shovellers engaged for years in shovelling coal from the

barges into the buckets, by means of which it would be delivered to the vessels coaled, gave similar testimony. The testimony of Robert Sass is important upon this point. He said:

“I was, as I have testified heretofore, hoist engineer on the barges. Sometimes I have seen a barge removed from a liner without being cleaned out of coal, *but more often the barges would be cleaned out*. When the barges were not cleaned out a few tons of coal would be left located in both ends of the barge and a little around the wings. The more frequent occurrence was that the barge would be cleaned out before she would be moved from the side of the liner. That coal was practically always there and never removed” (pp. 2226-7).

And, Jim Balestra, testifying to the same point said:

“When I was working as a shoveler in the barges operated by the Western Fuel Company, we would clean out the barges four times out of five. I mean to say that we would clean them out except for a little coal around the edges and at both ends, amounting to perhaps a ton or two” (p. 2229).

By cleaning out a barge, of course, is not meant the removal of every particle of coal. The construction of these boats is such that it would be impossible to accomplish such a result excepting at the expense of extraordinary labor. But the quantity of coal remaining in a barge at the time of a cleanup would always be present. As Sass testified:

“That coal was practically always there and never removed” (p. 2227).

It was just as much a part of the barge itself as though it had been permanently located there for ballast. Its presence in no way affected the weights of coal laden upon, or taken from the barges, or the overages, with the exception of the first cleanup after the barge originally went into service. When that occurred, she had and thereafter continued to have that same quantity in the hold.

LOGICAL EFFECT OF PROOF OF CLEANUPS.

By the testimony quoted, as well as by the books themselves, we have demonstrated so far as human agency will permit, that with each overage the barge was discharged of her entire cargo. The effect of such proof is to likewise establish that by the fraudulent weights and manner of weighing indulged in on the barges, cargoes apparently increased in weight within a comparatively short time, sometimes only within a few days, as much as 30 or 40 per cent. These overages confessedly could not be explained away by expert testimony.

While we might be able to find authority for increases such as are here involved, by resort to biblical history, inasmuch as it is not claimed that any of the defendants possess miraculous powers, that character of defense is foreclosed. In the absence of independent proof of fraud, these instances of overage themselves would be sufficient to establish it. Explained, however, by positive and convincing

evidence, that the overages complained of were directly caused by the fraudulently overweighing of the coal, it is inconceivable to us how counsel for defendants can claim that the evidence fails to justify a finding of fraud.

FRAUDULENT DRAW-BACK CLAIMS.

Among the vessels being supplied with coal by the Western Fuel Company were a number registered under the laws of the United States, engaged in foreign trade. Under the laws and regulations of the United States, for each ton of imported coal upon which duties had been paid, laden upon these vessels for fuel purposes, the individual or company owning such vessel was entitled to have refunded to him, or it, from the United States, the duty actually paid upon such coal. Most of these vessels enjoying the benefit of draw-back belonged to the Pacific Mail Steamship Company. The names of these vessels, that they were engaged in foreign trade, and that they carried the American flag, were proven (pp. 102-3). When foreign coal is intended to be placed in a vessel for the benefit of draw-back, a draw-back entry is made by or on behalf of the owner of the vessel. A sample of this draw-back entry appears on page 2907, volume VIII of the record. In this entry, the name of the steamship, the quantity of coal which it is estimated is to be placed in the bunkers, the date upon which, and the name of the vessel in which the coal was im-

ported, and the amount of duty paid, are all set forth. A declaration is then made by the owner, or his attorney in fact "*that the duties thereon were paid at the port of San Francisco*" on a given date.

Upon the making of this entry, the collector or his deputy requires the Surveyor of Port to direct an inspector to superintend the lading of the coal, and upon completion, to give him notice thereof. The coal is thereupon discharged into the bunkers of the vessel, the weights thereof being taken in the manner hereafter described, by an assistant customs weigher, after which, an endorsement is made upon the entry indicating the weight of the coal both in tons and pounds discharged upon the vessel, and the date upon which she cleared.

In the sample case referred to, the estimated weight of the coal was 3000 tons. The ascertained weight at point of delivery, 2965 tons 1385 lbs, the drawback or refunded duties being \$1986.88.

Accompanying the demand for the refund of the duties, an affidavit is required, containing the statement that the coal was imported, as stated in the entry, *the duties were paid thereon*, as therein shown, that the merchandise had been delivered to the company making the claim, and that no other certificate of delivery covering the merchandise had been issued (p. 381).

Upon compliance with these conditions, and only then, would the duty upon the coal be refunded.

If, in these drawback claims, it appeared that the weight of the coal delivered to a vessel with

benefit of draw-back exceeded the out-turn weight of such coal at the place of importation, upon which weight, duty had been paid, it is, of course, obvious that the Government would be refunding more duty than had been paid on said coal or that it had received.

If, as we have already shown, the actual weight of coal laden into these barges was the weight with which the barge was charged, and was also the weight upon which duty had been paid, and that when this coal was laden into vessels with benefits of draw-back, the weights were incorrectly taken and the coal was represented to the Government by the claimant of the draw-back, to weigh much more than its actual weight, and duties based upon such incorrect weight were paid to the claimant, it is equally obvious that the Government was being defrauded out of the duties refunded by it, representing such excess weight. It is equally true that the owner of the vessel who paid for his coal according to weights taken on the barge at time of delivery was likewise being defrauded out of the moneys paid by him, representing such excess weight.

And if an affidavit is made in which it is asserted that the quantity of coal represented by such excess weight *was actually imported upon a particular steamer and that duty had been paid thereon*, such affidavit is false and the person verifying it with knowledge of its falsity is guilty of perjury.

Table C, United States Exhibit 125, based on the draw-back entries and the books kept by defendant Mills shows that draw-back duties were refunded by the Government on 22,456 tons and 229 lbs. of coal in excess of the actual weight of the coal upon which duties had in fact been paid.

In some of these cases, as the evidence will show, the affidavits accompanying the claims asserted that the coal had been imported upon a particular vessel in which, in some instances, no part, and in other instances only a part of the coal had been imported. Most of these affidavits were made by the defendant, James B. Smith. Others had been made by the defendant, Howard, or other representatives of the Western Fuel Company.

So that the jury could understand the situation, several of these entries were explained by Mr. Tidwell. In this connection we desire to direct the court's attention, merely for the purposes of illustration, to three of these transactions.

A draw-back entry was made for 275 tons of coal which it was claimed had been laden on the steamship "Peru", which coal, it was asserted, had arrived at this port on the steamer "Harpeake", December 17, 1910, custom house entry 16806. On January 30, 1911, the barge "Ruth" had had a clean-up, in other words, all coal laden upon her had been completely discharged. Up to that time, and subsequent to her last clean-up, there had been checked into her 816 tons 1440 lbs. It had been laden with

coal upon four occasions: upon one occasion she had taken from the off-shore bunkers	558 tons	1970 lbs.
from the same bunkers	6 “	60 “
from the same bunkers	56 “	240 “
and from the steamer “Thor”	195 “	1410 “
aggregating	816 “	1440 “

With only this coal laden upon her, according to the records showing weights taken when discharging this coal into the vessels, it was claimed that she delivered to the steamer “Peru” 275 tons 1062 lbs. to the steamer “San Jose” 317 “ 222 “ and to the “City of Para” 290 “ 1432 “ making a total of 883 “ 476 “ or 66 “ 1276 “ more than she had taken on board (pp. 372-376).

The 816 tons 1440 lbs. represented the out-turn weight upon which the Government had been paid duty (p. 377).

All of these boats were American bottoms, engaged in foreign trade, with benefits of draw-back. Based upon this fraudulent and excessive weight, the Pacific Mail Steamship Company presented draw-back claims, supported by proper vouchers, and was paid by the Government, duties upon 66 tons 1276 lbs. more coal than it had received (pp. 378-384).

On this transaction the Government was paid duty on 816 tons 1440 lbs., which, at 45 cents per ton, equalled \$367.50, and returned to the Pacific

Mail Steamship Company, duties on 883 tons 476 lbs., amounting to \$397.45. In other words, it refunded \$29.96 more than it had received:

Another illustration may be gathered from the barge "Theobald". On October 4, 1906, this barge received from the steamer "Torjeviking" 1052 tons 1740 lbs. of coal, according to the ascertained weight, and upon which the Government was paid duty. Although this was all of the coal laden upon her, she was taken to the steamer "Sonoma" and, according to the records kept by the defendant Mills, delivered to the "Sonoma" 1134 tons 1297 lbs., or 81 tons 1797 lbs. more than she had taken on. For this last quantity of coal, a draw-back claim was made, supported by the necessary affidavit and declaration, upon which the Government refunded to the Pacific Mail Steamship Company, an amount representing duties paid upon coal claimed to have been delivered to the "Sonoma" (p. 419). In this case, the draw-back claim related to all of the coal laden upon the barge.

Again on January 21, 1906, the barge "Theobald" having previously cleared, received from the steamship "Tellus" 1114 tons 480 lbs. and from the barge "Viking" 410 tons 1100 lbs., making a total of 1524 tons 1580 lbs. She thereupon discharged into the "Sierra" 951 tons 91 lbs. and into the "Mongolia" 717 tons 1515 lbs., making a total of 1668 tons 1606 lbs. which was *144 tons 26 lbs.* more than was laden on the barge. A draw-back claim was presented based upon all of the coal

claimed to have been discharged, supported by affidavits, apparently always available, and paid by the Government (pp. 411-412). For other illustrations see pages 412-418.

**CLAIM AND AFFIDAVIT FALSE, RESPECTING IMPORTING
VESSELS.**

For the protection of the Government, the affidavit accompanying the draw-back claim must state the name of the vessel in which the coal upon which the refund duty is claimed, was imported. A similar statement must be made in the draw-back entry itself. A comparison between many of the draw-back claims and affidavits introduced in evidence, and the records kept by the defendant, Mills, pointing out the disposition of the cargoes of imported coal discharged, will show that the affidavits made from time to time by the defendant, Smith, in addition to the false statements already referred to, also contained false assertions regarding the name of the ship upon which it was claimed the coal described in the draw-back entry and affidavit was imported. For brevity's sake and to illustrate this portion of our argument, we will direct the court's attention to one typical case.

On January 18, 1907, the steamer "Tellus" arrived at San Francisco from Ladysmith, having upon her, according to her bill of lading and invoice, 3752 tons of coal. She subsequently discharged 3645 tons, the shortage being 107 tons (p. 1285). The "Tellus" first commenced to discharge on January

18, 1907, and finished January 21, 1907 (p. 1290). No portion of the cargo of this steamship was discharged into the offshore bunkers (pp. 2191-2).

According to the records kept by the defendant, Mills, between the 7th and 31st days of January, 1907, there was laden upon the barge "Nanaimo" the following quantities of coal from the following sources, viz.:

On January 7, from the steamship			
" Sheila "	266 tons	1480 lbs.	
On January 10, from the offshore			
bunkers,	31 "	1830 "	
On January 9 and 11, from the			
steamship " Sheila ",	719 "	650 "	
From the ship " Titania ",	809 "	1390 "	
	<hr/>	<hr/>	
making a total of	1827 "	870 "	
(pp. 1288-9; 1293).			

The court will notice that the only coal taken from the offshore bunkers by the "Nanaimo" was on *January 10, 1897*, and that the steamship "Tellus", as has already been shown, did not reach port until *January 18, 1907*, ten days later (p. 1280).

The remaining coal laden upon the "Nanaimo" was received directly from the "Sheila" and "Titania".

The coal thus laden upon this barge "Nanaimo" was delivered to the "City of Sydney", "Coptic", "Track", "City of Para" and "Korea". Her total discharge, according to the record of weights kept,

was 1954 tons 1521 lbs., or an overage of 127 tons 642 lbs. (p. 1289).

The court will further note, however, that into the "City of Para" was discharged 31 tons 400 lbs. of this cargo.

Between January 21 and January 23, 1907, there was checked into the barge "Theobold" 451 tons 630 lbs., consisting of two items, first:

Offshore bunkers,	39 tons	2170 lbs.
"Tellus"	411 "	700 "
	<hr/>	<hr/>
making a total of	451 "	630 "
(p. 1289.)		

The coal which came from the offshore bunkers was checked into the barge January 21, 1907 (p. 1290). The court will also remember that none of the cargo of the "Tellus" went into the offshore bunkers on or prior to this date. The whole of the cargo of the "Theobold" was delivered to the "City of Para". When discharged, however, according to the weights kept, it had increased in weight in not more than three days, 82 tons 1007 lbs. (pp. 1290-1). From this record it appears that the only portion of the coal delivered to the "City of Para" that came off the steamship "Tellus" was 411 tons 700 lbs. A drawback entry was presented by the Pacific Mail Steamship Company covering all of the coal claimed to have been delivered to the "City of Para", including the overage. The rebate claim was numbered 63 (pp. 1285-6). In

the entry the vessel upon which *all* of this coal was imported is stated to be the "steamer Tellus", and that such coal was imported in her on January 18, 1907. Accompanying this drawback claim was an affidavit sworn to by James B. Smith, in which, among other things, he states:

"I, Jas. B. Smith, Vice-pres. and a stockholder Western Fuel Company do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon as herein shown * * *"
(p. 1285).

A table showing this transaction appears at page 1293.

In this case the affidavit was false respecting the vessel in which the coal was imported, the time when such importation occurred, the quantity of coal actually delivered to the "City of Para", and was also false in respect to the statement that upon all of said coal duties had been paid to the Government.

The illustrations cited are but a very few of the several hundred of instances where false drawback claims were presented and paid, each based upon a false affidavit.

KNOWLEDGE OF FRAUDULENT OVERAGES.

From the evidence already discussed and pointed out, it affirmatively appears that the existence of these overages was known to the defendants.

At the conclusion of each day's work a report of the day's business would be prepared by Mills and forwarded to the office of the Western Fuel Company, for the benefit of the defendant James B. Smith and its other officers. These reports disclosed all coal discharged from importing steamers and, upon clearance of their cargoes, the resulting shortage or overage would be made manifest. It would also contain a statement of the coal taken upon the barges and the amount supplied to vessels buying coal. When the barges "cleaned up" the overage or shortage would also be made to appear (pp. 202-203). So far as overages on barges were concerned, as was said by Secretary Norcross:

"The defendant Mills sent a daily report showing overages, whenever one occurred on one of the barges at a cleanup, to the defendant James B. Smith" (p. 1245).

In fact, whenever such cleanup would occur, a specific report covering its receipts and discharges would be made (pp. 201-202), and the letter "E" would in each instance be written in the books of Mills, indicating that the items had been entered and the reports sent.

The defendant Smith himself testified that Mills' reports "always showed the overages" (p. 2192), and the defendant Mills, on cross-examination, admitted that the daily report sent by him to Smith was "similar to my book" (p. 2141).

These overages from barges, as well as the overages developed from time to time in the other

departments of the Western Fuel Company, were shown upon the monthly statements of coal received in evidence. For instance, in the statement of coal received for the month of June, 1906 (United States Exhibit No. 29) appeared the following:

“Q. R. Ex barges 559 tons, 367 lbs.”

This item is explained by Norcross to mean the “total over-run of deliveries out of barges for that month” (pp. 141-142). And, as explaining how this overage was understood, he further testified:

“Q. What do you mean by overrun?

A. I mean excess reported over weights reported having been in the barges.

Q. Then that item explained means this, that 559 tons of coal were taken off the barges more than placed into the barges during the month of June, 1906?

A. I do not know that it does.

Q. Well, what does it mean?

A. It means that Mr. Mills reported having taken off that much more than he reported having taken in.

* * * * *

Q. Then the explanation of that item is, that Mr. Mills, he being one of the defendants in this case, reported to the company that he took off the barges 559 tons and 367 lbs. more coal than was put on to the barges?

A. That is right.

Q. I just want to call your attention to two or three of these items, Mr. Norcross, because I suppose your explanation will be the same as to all of them.

A. It probably will” (p. 142).

And in explaining a similar entry showing an overrun of coal in yard, he testified:

“Q. Then it is one of two things: it either represents that after you sold all of the tons of coal that your books showed should have been or were placed in the yard, you still had 808 tons on hand, or that you sold 808 more tons from the yard than your books showed you had placed in the yard; is not that correct?

A. That is correct” (p. 145).

The existence of those overages between 1904 and 1913 were not only known, but were repeatedly discussed by Secretary Norcross with the defendant James B. Smith and with the president, John L. Howard (pp. 204-205).

The financial statements presented annually to the directors and stockholders likewise at times disclosed the result of the overages in money (United States Exhibits 96-103).

COMPLAINTS BY ENGINEERS OF THE PACIFIC MAIL STEAMSHIP COMPANY SHOWING SHORTAGE IN COAL.

That the overage shown to exist by the books kept by the defendant Mills and by the records of the Western Fuel Company was due to false and fraudulent weights and not to any actual increase in the weight of coal, is attested by the many complaints made from time to time by engineers of the Pacific Mail Steamship Company, in the course of which they repeatedly insisted that their boats were not being supplied with the quantity of coal charged against them and for which the Pacific Mail Steamship Company paid.

During the whole of the period of time between April, 1906, and January, 1913, William Chisholm was marine superintendent of this company (p. 436), and as such, had general supervision and control of the coaling of its vessels (p. 438). It was his duty, among other things, to see that the coal called for by the weights furnished to the Pacific Mail Steamship Company were correct (pp. 440-441). The person who immediately supervised the weighing and checking of the coal delivered to these vessels was William Marks (p. 439).

Although almost incomprehensible, it appears that while Chisholm had been repeatedly notified that the Western Fuel Company was over-weighing the coal which was being supplied to the vessels of his principal, he never attempted or pretended to make any investigation until two years thereafter, and then only upon two occasions and for short periods of time. We quote from his testimony:

“Indirectly, I have been notified, as marine superintendent, that the coal was being over-weighed. Such indirect notifications came to me while I was receiving donations of coal and money. I think I had such indirect information in 1912. In 1909 I received notice about the first shortage of coal on one of our ships. I never made any investigation for the purpose of ascertaining the weight of the coal that was checked in or upon the barges, or whether coal had been weighed before it was placed on the barges. * * * I do remember receiving such a notice from a man named Hamilton, who was chief engineer on one of our boats. I should judge that was in 1911 or 1912.

I also received notice from a man named Bunker, who was chief engineer on one of our boats. * * * After receiving these notices I did not endeavor to ascertain whether the coal discharged from the barges was weighed before being so discharged (pp. 441-442).

* * * * *

To the best of my knowledge I received only two complaints about short weighing since 1907. The complaints were not general in their character. They referred to particular steamers on particular trips. The steamers were the 'Manchuria' and the 'Siberia' " (p. 445).

In January, 1909, W. L. Bunker, chief engineer of the steamship "Manchuria", forwarded a communication to Chisholm, in which he stated:

"Please be advised that in coaling at S. F. we received all coal taken on board in reserve bunker and drew from main bunkers for port use. Have weighed samples of the coal supplied in S. F. and find it runs 41 cubic feet per ton (when allowed to partly dry out); by allowing this average, we are still 123 tons short. *This shortage I have charged to port consumption at S. F., making 309 tons in place of 186 tons as actually burned*" (p. 455).

Respecting the circumstances under which this letter was written, Bunker himself testified:

"I do not remember getting any instructions to put in a report in writing. Naturally, I believed there was a shortage on that occasion or I would not have written the letter. I was employed, body and soul, by the Pacific Mail Steamship Company at that time, and the report was made in my capacity as chief engineer on the liner 'Manchuria' " (p. 1075).

It seems that before the voyage started upon which this letter was written, personal complaints had been made by Bunker, among others, to Chisholm (p. 1079). One would imagine that, whether the sending of this communication was the result, as claimed by Bunker, of positive and definite information acquired by him respecting the quantity of coal placed in his reserve bunker, or whether it was the result of mere suspicion that the company was being shortweighted in coal, his attitude and conduct would call, if not for praise, for at least encouragement. Encomiums, however, were not for any such employees of the Pacific Mail Steamship Company, for, according to Bunker's testimony, not disputed by Chisholm, the only response that he received to his letter was:

"He (Chisholm) told me not to write any more letters of that description" (p. 1081).

A year later, on January 31, 1910, J. S. Hamilton, chief engineer on the steamship "Siberia", sent a communication to Chisholm, in which he said:

"Our average daily consumption was 160 tons, but I have to log 7 tons per day more to bring the bunkers square, as from the amount we were charged with fully 100 tons of rain water went in with the coal" (p. 444).

Neither of these two communications, it seems, stirred Chisholm into activity; for we find that no investigation was made by him until a long time after the receipt of the last letter. As to this, Chisholm himself says:

"It is true that the first complaint I received was around 1908 or 1909. The reason I waited two years before going down to the dock at night to find out whether the coal had been properly handled was that I was satisfied when I received the first complaint that there was absolutely nothing in it" (p. 446).

Even after waiting for two years the investigation pursued by Chisholm was not very enthusiastic or comprehensive; for, according to his testimony, his activities consisted in going down to see how coal was handled upon one or two occasions, he stating:

"Once or twice when coal was being laden into our liners at night I was present for the purpose of seeing how the coal was handled and whether our men were at their stations. These visits of mine occurred, I think, in 1911, and they were with reference to the complaints or communications hereinbefore referred to. I went there quietly, not making my presence known, because I wanted to see if there was anything wrong in the operation of coaling. On each occasion, I remained an hour or half an hour. I discovered nothing wrong on either occasion" (p. 445).

He then states that upon perhaps half a dozen occasions in 1911 or 1912 he had the scales on the barges tested (p. 445).

Before becoming marine engineer Chisholm had been chief engineer of the "Mongolia" for a number of years. He knew exactly how liners were coaled. He also must have been familiar with the method of weighing, and therefore knew that weights were determined by averages. Even

though the scales were accurate, he likewise knew that the accuracy of the weights depended upon keeping the tubs even and in insisting that the tubs that were weighed should be as nearly as possible representative of the tubs that were not weighed. Knowing all of these things, however, with an innocence indicative of childish simplicity his sole resort was to the scales. And, as weights were seldom taken more than two or three times during the night, a half hour's inspection could accomplish little, if anything.

Another peculiar transaction occurred which is rather a persuasive circumstance, in connection with others to which we shall hereinafter direct the court's attention, indicating some sort of collusion between the employees of the Pacific Mail Steamship Company and the officials of the Western Fuel Company.

It frequently occurred that vessels would be coaled from both sides at the same time. In thus coaling a ship, two barges would be used, and, of course, it would be impossible, as Chisholm himself testified, for Parks to keep watch upon the coaling operations thus simultaneously in progress (p. 442).

Parks, when cross-examined, conceded that as to one of the barges no representative of the Western Fuel Company would be present (p. 1534).

In 1908, because of complaints made to Chisholm concerning the shortweighing of coal, he recognized the necessity of employing some person

to assist Parks in keeping a record of the weights of coal being supplied to the ships, and to see that the tubs were kept even. Instead of acting as ordinary prudence would suggest, *he went to the defendant Mills* and requested him to send him a man to be thus employed. Mills furnished David G. Powers, telling him, as might be expected, "to give the Western Fuel Company the best of it". The circumstances surrounding his employment and what, if anything, was accomplished, is illustrated by his testimony. Says Powers:

"In 1908 I was sent to the Pacific Mail Steamship Company's dock by Mr. Mills to work for the Pacific Mail Steamship Company as a weigher. * * * I remained in their employment about sixty days. I quit them in disgust. I supposed Mr. Chisholm was my superior, but I got my orders from Mr. Mills. Mr. Mills, in sending me over, told me to give the Western Fuel Company the best of it. In sending me over to the Pacific Mail Steamship Company, Mr. Mills told me that said company had informed him that they were receiving complaints from their engineers about the short-weighting of coal, and had requested that he send them a weigher to assist their own weigher, Mr. Parks. I reported to Mr. Chisholm who testified here the other day. My duties during the sixty days of my employment with the Pacific Mail Steamship Company were checking coal with the customs weighers on board the barges which were being discharged into the Pacific Mail steamers. I was paid by the Pacific Mail. As to what I observed, it was the same old racket all along; they were robbing the Pacific Mail. I saw the same thing the second day I was working for them. I went to Mr. Chisholm and complained

and told him he was being robbed. In answer he tapped me on the back and said, 'You are getting your pay, aren't you?' and I said 'Yes'. Then he said, 'Well, go back and sit down and say nothing; keep your mouth shut' " (pp. 697-698).

Further complaints were made by him to Mr. Donaldson, who at that time was assistant superintendent of the Pacific Mail Steamship Company (p. 699).

That Powers was employed by the Pacific Mail Steamship Company in the capacity of weigher is not denied. That he was directly employed by the defendant Mills, acting for Chisholm, is likewise undisputed.

The complaints to marine superintendent Chisholm were only a few of the many protests made by the engineers. Evidently realizing that nothing could be achieved through this source, they went directly to the representatives of the Western Fuel Company. Bunker himself testified:

"Most of my complaints were made to Powers, who was the weigher for the company. On a few occasions I complained to Chisholm, the marine superintendent. I complained more than once to Eddie Powers. He was the outside man for them and, of course, I used to tell him I thought the weights were not right. I do not remember making a personal complaint to the defendant Mills. I told him several times that I thought his coal was 'bum', and that it was short on weight. Mills on such occasions told me that the Government weighed the coal, and what could he do about it" (p. 1076).

It seems that Mills thought that he could purchase the friendship and silence of Bunker, like the friendship and silence of other employees had been bought, as we will hereafter show. One day Bunker met him on the dock and Mills said, "If you would like a ton of coal", or something like that, "I will send it over to the house", but Bunker, unlike some of its other employees and officers, told him that he had better put the coal in the ship (p. 1076). Notwithstanding this statement, however, Mills sent to Bunker's house a ton of coal, accompanied by a receipted bill (pp. 1076-1077).

While Edward Powers was assistant superintendent of the docks for the Western Fuel Company, he also received many complaints. Upon this subject he testified:

"While I was assistant superintendent there were quite a few complaints from engineers of the Pacific Mail Steamship Company regarding the shortages of coal. I communicated these complaints to the defendant Mills. * * * The complaints that came to me from engineers were not always about shortages. Sometimes they had reference to the quality of the coal. I received complaints concerning shortages of coal quite often,—whenever they could catch me, that is, I guess, when I did not see them coming. I cannot remember how often I received complaints while I was assistant superintendent, but it was quite often. I would say in answer to these complaints that we were selling the coal by weight, and that the United States custom men were weighing it. When I spoke to the defendant Mills about the matter, he would tell me that the United States custom men were weighing the coal. He gave me the

same excuse that I was giving the other men, and it was a true excuse (pp. 869-870).

* * * * *

"I don't recall any period of time during which I was acting as assistant to the superintendent when complaints were not made by engineers of the Pacific Mail Steamship Company and other boats regarding shortages of coal. The complaints were made from time to time during the entire interval. I would give the excuse and then walk away from them. They may have said lots of things but I did not hear what they said. I think Mr. Chisholm once told me about the matter, and said that Mr. Bunker had complained. I believe he also called my attention to a complaint made by Mr. Hamilton, the chief of the 'Siberia'. I believe also that I had complaints direct from Bunker and Hamilton, as well as from other engineers. I also received personal complaints from Thomas Sawden, chief on the 'Peru', and then on the 'Mongolia'. There was another complainant, whose name I do not recall; he is now dead. Thomas Sullivan, who succeeded Mr. Sawden on the 'Mongolia', also complained" (pp. 872-873).

Nor can there be very much question but that the complaints of these engineers were well founded.

"Q. Well, when these complaints were being made to you from time to time by engineers in the employ of the Pacific Mail Steamship Company, for instance, confining your attention at this time to those complaints, did you know whether there was any justification for the complaints?

A. Well, I thought there might be.

Q. You thought there might be. Why did you think there might be?

A. The barge showed a little overage; I thought there might be something to do with it, moisture and so forth.

Q. Of course, that is not a complete answer to my question. You say that you did think there might be some cause for the complaints made from time to time by the different engineers, with reference to the quantity of coal or the shortage of coal, or the quantity of coal that was discharged into the ships upon which they were acting as engineers. Now, I will ask you why, in your judgment, or rather, why did you believe or did you think or conclude that there was justification for those complaints?

A. The fact that the barges overrun; they show in the book they overrun.

Q. And that indicated to your mind what?

A. Well, they were getting less coal than was charged to them" (p. 886).

According to the same witness, the bunker complaint was reported to J. B. Smith, who, in his characteristic manner of disposing of such matters, observed that "he is always kicking" (p. 887).

Of course some reason must have existed for Chisholm's constant state of innocuous desuetude, so far as investigating complaints was concerned, and for his extreme friendliness towards those who, if the complaints were well grounded, were intentionally and by criminal conduct defrauding his employer. That it was impossible for the Government to delve deeply into the vitals of this peculiar relationship, so as to thoroughly develop it, can readily be imagined. Sufficient appears in the record, however, to account not only for Chisholm's apathy, but to cause one to suspect that the Western Fuel Company, acting through the defendants James B. Smith and Frederick C. Mills, believed it necessary to create a friendly disposition on the part of the employees of the Pacific Mail Steamship Company,

even though its result might be a lack of loyalty on their part to their employer.

COAL FURNISHED GRATIS TO EMPLOYEES OF THE PACIFIC MAIL STEAMSHIP COMPANY, AND GIFTS OF CASH MADE.

If the ordinary course of business were pursued, if the usual business acumen were displayed, one would imagine that the dealings between the Pacific Mail Steamship Company on the one side, and the Western Fuel Company on the other, would be carried on at arm's length, and accounts presented by the latter to the former closely scrutinized. To accomplish this, no divided allegiance could be permitted. Absolute loyalty on the part of the employees of the steamship company would be demanded. Yet, throughout the entire period covered by the evidence introduced on the part of the Government, we find that quantities of coal were gratuitously delivered to the houses of many of the officials and employees of the Pacific Mail Steamship Company. This practice of petty bribery apparently excluded no one. It included R. P. Schwerin, president of the Pacific Mail Steamship Company; Chisholm, its marine superintendent; employees of the treasurer's office, Parks, its weigher; its subordinate employees employed upon the docks and barges, and almost reached to the office boy. Chisholm admits the existence of this situation, he testifying:

"I have since I have been marine superintendent, received donations from the Western Fuel Company. To the best of my memory the first donation was about the first Christmas

that I was marine superintendent. That was in 1908. I received a Christmas present. It was about \$50, and I was receiving that sum each year thereafter. It was in cash. I have also during the entire time that I have been active as marine superintendent been receiving donations of coal from that company. The first donation of this kind, I think, was in 1908. I have been receiving my coal from the Western Fuel Company ever since. It has been delivered at my home in, I think, ton or two ton lots. I would receive two or three such lots each year, I suppose, but I did not keep accurate track or record of it. At any rate, whatever coal I use at my home has been received from the Western Fuel Company, and has been received by me practically ever since I have been marine superintendent" (pp. 438-439).

Extracts from the donation account of the Western Fuel Company, in so far as they were material in this case, were introduced in evidence and will be found on pages 652 to 654 of the record. Most of these items relate to employees of the Pacific Mail Steamship Company. Among them will be found donations to P. H. McCarthy, clerk in the treasurer's office; chief engineers, Chisholm, and others. Among these names will be found the names of several of the United States assistant weighers, to which reference will hereafter be made.

This donation account does not show cash presents made during the holidays by the Western Fuel Company to employees of the Pacific Mail Steamship Company. Nor does it show moneys paid to assistant weighers for overtime, in contravention to the rules of the department. That it does not

show all of the coal gratuitously donated to officers and employees of the Western Fuel Company is made manifest from what follows.

**COAL DONATED TO THE GENERAL MANAGER AND ALSO TO
THE PURCHASING AGENT OF THE PACIFIC MAIL STEAM-
SHIP COMPANY.**

For a number of years R. P. Schwerin was vice president and general manager of the Pacific Mail Steamship Company. In a different part of the ledger, entirely separate and apart from the donation account, was carried an account with Schwerin. This account was opened in September, 1911, the last item being June 18, 1913. During this period of time coal was supplied him aggregating \$1358. From time to time, according to the account, cash was paid representing credits. A copy of the account is found on pages 1239-1241. This account, if the entries were accurate, upon its face disclosed that Schwerin had paid at different times for every dollar's worth of coal that had been delivered to him. And yet every item indicating moneys paid by Schwerin was absolutely false. It was not until the Government was about to close its case that the falsity of this account was divulged. With respect to these items, secretary Norcross, being recalled to the stand, testified:

“The account shows that a certain amount of coal was delivered to R. P. Schwerin and paid for by him. The total amount from September 11, 1907, to March 12, 1910, is \$496, with credits of an equal amount to March 17, 1909. The coal was, according to the ledger, delivered to Mr. Schwerin's home at San Mateo and the account

is a personal one. I don't think any money was received from Mr. Schwerin for that coal. *I don't believe he paid a five-cent piece to the Western Fuel Company for any part of that coal.* The regular order would come to the office and go as a rule to the defendant James B. Smith, first. He would give notice to the shipping clerk to have the coal shipped and send a regular order to the wharf. All bills for coal deliveries are placed on Mr. Smith's desk, and, when these Schwerin bills reached him, he would hold them up, and at a later date sometime, go to the bookkeeper and tell him to receipt the bill and make an offset entry for it, charging the amount to operating expenses, so that, as a matter of fact, although our ledger shows Mr. Schwerin did pay for each quantity of coal delivered to him, it would appear that in fact there was not a cent ever paid by him to the company for that coal. * * * We would, however, after each one of these bills was receipted by the defendant, James B. Smith, and order charged to operating expenses, know in fact that this was to be a donation. I don't know why we did not put these amounts in the donation account" (pp. 1235-1236).

Referring to the second portion of the account, the witness further testified:

"This shows an amount of \$862 of coal furnished to Mr. Schwerin. Of that amount \$772 are shown by the ledger to have been paid. I don't think that Mr. Schwerin in fact paid a five-cent piece on account of that coal. I think the same procedure was pursued so far as each one of these deliveries of coal is concerned as was pursued regarding the other coal in the other account. The reason the account does not balance is that there are three items that apparently remain uncredited and unpaid" (p. 1237).

This same witness also admitted that coal had been supplied gratuitous to Mr. Thompson, the purchasing agent of the Pacific Mail Steamship Company, during the past five years (pp. 1241-1242).

This item likewise was not shown by the donation account, and, according to Norcross:

“There would be no way of telling what quantity of coal was supplied each year by the Western Fuel Company to Thompson” (p. 1242).

Nor could he give any reason why the donation account did not show these deliveries of coal, excepting that, “Mr. Mills did not report it when delivery was made” (p. 1242). What other deliveries were not reported, the Government was unable to learn.

It is significant, however,—a circumstance that should not be lost sight of—that no engineer was called to the stand by defendants to vouch for the accuracy of the claim that the Pacific Mail Steamship Company received all of the coal for which it purchased.

After a barge would be laden with coal, it would be removed from the offshore bunkers, and when coal was to be delivered to the bunkers of a vessel, it would be taken over to, and moored alongside of

or tied to the vessel to which coal was to be supplied.

Upon each of the barges was located a hoist by means of which the coal would be carried in tubs from the hold of the barge to the required height, and dumped into a temporary chute leading to the bunker holes of the vessel. The tubs on two of the barges were dumped by means of a rope controlled by a man known as the "dumper" occupying a position elevated above the deck of the barge. The tubs on the remaining barges were automatically dumped by a tripper with which they came in contact when they reached the desired height.

SCALES AND METHOD OF WEIGHING.

Two styles of scales were used upon the barges. On two of the barges, the Nanaimo and the Comanche, a type of scale known as a "hanging scale" or "rod scale" was used. This scale consisted of a perpendicular rod running down into the hold of the ship, on the end of which was a hook. The top of the rod was attached to the hanging scale. When a tub was to be weighed, it would be hooked on to the scale and its weight taken by the Government weigher. In this operation, the tub while being weighed, would be located in the hold of the barge under the hatch (pp. 690, 858, 1178).

This hanging scale could not be used until a considerable quantity of coal had been removed from the barge, thus making an opening in the coal of sufficient depth to permit the use of the hanging

scale (pp. 690-1). Before reaching the bottom of the barge or technically speaking the "skin of the barge" by the removal of the upper part of the coal four or five hours would be consumed" (p. 1178).

On all of the other barges, a type of scale known as a platform scale was used. This scale, lodged upon wheels, would be spotted upon the deck of the barge adjoining the hatch from which the coal was being raised. As the tubs of coal would be hoisted out of the hatch, it would be necessary for at least one of the shovelers in the hold to climb up to the deck and by means of two rope tails attached to the bottom assist in pulling the tub over to, and landing it on the scale (pp. 691-3). Upon occasions it was essential to bring two men up from the hold for this purpose (pp. 860-1, 1099).

While coal was being discharged into the bunkers of a ship, shovelers known as "trimmers" would be located in the bunkers for the purpose of distributing and levelling the coal being received into these bunkers through the bunker holes. Excepting when a bunker was almost filled with coal, or the barge was about being cleaned out, the tubs of coal would be hoisted at the rate of between 70 and 120 an hour, depending to a large extent, although not altogether, upon the height to which they would have to be hoisted. Upon some of the barges the tubs would go up as rapidly as 120 tubs an hour, or two tubs a minute (p. 691).

On cross-examination, the witness, Edward Powers, described these operations with some little detail:

“The speed with which the buckets go up depends, as I have heretofore testified, on a variety of circumstances, among others, the height to which the buckets are hoisted, the ability of the men in the hold, and on the engineer. Most of the ships require only a low hoist. The ‘Manchuria’ and the ‘Mongolia’ are up high, and the buckets would have to go, I should judge, about 25 or 50 feet to get up to the tripping place. The speed with which the buckets go up, depends, as I have said, upon the engineer. If he is nervy, he brings the buckets up and lets them down as fast as he can. The hatch-tender gives the signal for the bucket to start. It is pulled slowly until it gets clear of the barge; then he gives another whistle, and the bucket comes a good deal faster. The speed with which the buckets go up also depends upon the condition that a particular bunker may be in, that is, on whether the bunker is comparatively empty or comparatively full, for instance. When you commence a bunker the work goes very fast, but towards the end it goes slower. On the ‘Melrose’, which has an automatic discharge, you can hoist about three tubs to two minutes. The hatch-tender and the different gangs do not work at the same rate of speed. Some are faster than others, just as one man may talk faster than another, and it also depends upon the engineer and sometimes the weigher” (pp. 901-2).

In discharging coal from barges, four tubs would be used, numbered consecutively 1, 2, 3 and 4. These tubs would be hoisted one after the other in the order in which they were numbered, three tubs always being in the hold while one was on the hoist (pp. 861, 691). To each of these tubs would be assigned two men who would attend exclusively to the particular tub to which they were assigned,

making in all, eight shovelers (pp. 860, 738). In addition to these eight men, there are also employed on a barge the engineer, the barge tender or keeper, a foreman of the barge and a hatch-tender (p. 738). The hatch-tender is a man that is highest in authority upon a barge (p. 901). While the barge is coaling a vessel, the hatch-tender stands directly over the hatch, gives the signals for the hooking on of the tubs, and the general operation of the buckets (pp. 738-9). As already explained, an average system of weights prevailed. The rule was to weigh a round of tubs, which would be the four tubs, one after the other, out of every sixty tubs discharged. Sometimes one tub out of every fifteen would be weighed. This last practice, however, was but seldom pursued.

As a matter of fact, as we will presently show, it frequently occurred that weights would only be taken two or three times a day or night, and that when weights were not taken, the assistant weigher, instead of standing by the hatch facing the tubs to observe whether they were evenly filled, would spend his time on other parts of the barge, frequently so far distant that the contents of the tubs could not by any possibility come within his observation.

TAKING WEIGHTS.

The right to designate when weights were to be taken devolved upon the government weigher. He unquestionably had the right to weigh the tubs

when he saw fit, and in fact to weigh any or every tub (pp. 747, 858). On the barges upon which the platform scales were located, when the weigher desired to have a round of weights taken, he would notify the hatch-tender who, in a loud tone of voice would call out to the man in the hold below "on the scales". As to this matter, David G. Powers testified:

"It was the custom to take the weight of four buckets at a time; that is known as a round of buckets. When the customs weigher wanted to take a weight he would holler down to the hatch-tender, 'On the scales'. Then the hatch-tender would holler down to the eight men below in the hold of the barge" (p. 691).

At the time this order was usually given, an empty tub would be descending, having just been discharged (p. 861).

This situation was described by Edward Powers, from whose language we quote:

"Q. When a weighing is taken, whereabouts is the first tub that is called for as a general rule, at the time when the customs-house man hollers out 'On the scales'?"

A. It may be in the air or it may be in the process of being dumped or it may be in the hold of the barge.

Q. Oftentimes the first tub is in the air, is it not?

A. Oftentimes it is in the air, yes; not in the air coming up but in the air coming down.

Q. In the air coming down?

A. Yes, sir" (p. 912).

That it was the hatch-tender who called out "On the scales", or made known to the shovelers below

that a weight was to be taken, is also made manifest by the testimony of Tony Belish, one of the barge shovelers, he stating:

“I would know when a weight was going to be taken because the hatch-tender would holler, ‘Give me a tub on the scales’. There are two different kinds of scales on the barges,—one a platform scale, and the other a hanging scale, the latter of which hooks on to the tub down in the hold. When the coal was to be weighed on the platform scales, the hatch-tender would call for a couple of men to come up from the hold on to the deck and give a hand and pull the tub over on the scale. *These men would come up to the deck before the tub came up.* After the men came up on the deck the shovelers in the hold would stand there and fill up the tubs. They would fill them up good; you know, load them. They would put a little more coal in the tubs when they go on the scales. The hatch-tender gave me a sign to that effect. He would say, ‘This fellow is going on the scale’, and would make a sign which everybody knows who has worked down there five or six years” (p. 1137).

And that while the assistant weigher would designate when a tub was to be weighed, the order would be transmitted through the hatch-tender, is also shown by the same witness’ testimony on cross-examination, he saying:

“Q. Now, the only sign you had, or only signal you had that tubs were to go on the scales was either a whistle, or the hatch-tender would say, ‘The tub is to go on the scales’?

A. Yes.

Q. That was the only sign you had, was it not?

A. Well, sometimes he gave me sign like that (illustrating).

Q. A sign like that?

A. Yes.

Q. That is to say, before you knew the tubs were to go on the scales?

A. Sure.

Q. Well, now, didn't the customs-house man tell you that the tubs were to go on the scales, or didn't he tell the hatch-tender that the tubs were to go on the scales?

A. The custom-house officer told the hatch-tender, and the hatch-tender told it to the men down in the hold.

Q. The hatch-tender would tell it out loud, would he not? He would call out loud, 'On the scales', would he not?

A. Well, there is three tubs in the pile, and one tub in the hatch, and they put more coal in the three tubs in the pile."

* * * * *

"Q. Did you ever hear the custom-house officer say 'On the scales'?

A. Very few times.

Q. Very few times. Did you ever hear the hatch-tender say 'On the scales'?

A. Yes, all the time.

Q. He said that all the time, that they were to go on the scales?

A. The hatch-tender, yes.

Q. And that was the signal that you had to know that the tubs were to go on the scales?

A. Yes."

* * * * *

"Q. Now, I will put it to you slowly, and see if you do not understand; whenever the hatch-tender wanted the tub to go on the scales, he said out loud, didn't he, 'On the scales'?

A. Yes, he sung out, 'On the scales'.

Q. And then all the men knew the tubs were to go on the scales, didn't they?

A. Yes" (pp. 1140-1142).

Immediately after the cry "On the scales" was given, either one or two men would be called up from the hold of the barge to assist in landing the tub on the scales. Their arrival on deck would precede the hoisting of the tub. This, of course, would occupy some few minutes of time. This phase of the operation is thus described by Edward Powers:

"Sometimes we brought up two men instead of one to help put the tubs on the scales. I would call them up by name. In answer to the question whether the men understood in that case that a weight was to be taken, I would say that I don't know what they thought. Sometimes it was not necessary to bring up men out of the hold. We might have the bargeman to help us, but that was not the general practice. There would be a sort of cessation in the hoisting of the tubs when the order was given for the men to come up from the hold. * * * The men who came up from the hold would help to pull the tub over and land it on the scales" (pp. 860-1).

On cross-examination, he further said:

"Q. Now, how do they get the buckets to the platform of the scales?

A. Well, he yells to the engineer 'On the scales', and the engineer comes ahead slowly until they reach the level of the scales, the platform of the scales, and he draws the tub toward him, and lets it go back again, and when it comes back again so that the men can get it, they grab the tail, that is a rope on each side of the tub—and put it on the scales, and at the same time the hatch-tender is pulling on the rope" (p. 906).

TIME OCCUPIED IN WEIGHING AND RESULTANT ADDITIONAL
TIME TO LOAD BUCKETS.

That some considerable period of time would be occupied in weighing a round of tubs, of course, is obvious. This fact has also been established by some of the testimony already cited. There is ample other evidence in the record to place it beyond dispute. According to Edward Powers, the operation occupied from 12 to 20 minutes, he testifying:

“It would take from three to five minutes to weigh each tub. The time in which the men would have to load the tubs remaining in the hold would be increased by the time which it took to weigh the tubs, which would be considerable” (p. 861).

And again, on cross-examination:

“Q. But when these buckets are to be weighed, four of them in a round, there is a little more time in the nature of the work in which to fill up these buckets, according to your testimony?

A. There is” (p. 903).

* * * * *

“Q. And while the custom-house weigher is taking that first weight some of those other tubs at least are still in the process of being filled?

A. Yes, sir.

Q. And is that in part what you have reference to when you say that the stevedores then have more time with regard to the filling of the tubs than when they are engaged in meeting the hook?

A. They certainly have more time, certainly” (p. 913).

The same character of evidence was given by engineer and hatch-tender, Sass, he stating:

“About fifteen minutes would be occupied to take the weight of four tubs” (p. 1099).

And shoveler Philip Ganesi, some of whose testimony will be again referred to later, was questioned upon this subject as follows:

“Q. When the weight was to be taken, you would put in fine coal, would you?

A. Yes, and give plenty of chance to fill them up.

Q. You had plenty of chance to fill them up, too?

A. Yes.

Q. That was because the four buckets were to be weighed in succession, was it?

A. Yes.

Q. And you had more time then to put in the coal in the buckets than you did when they were going up at other times?

A. Yes” (p. 1111).

As each tub had to be weighed separately and as after a tub had been weighed it would have to be hoisted, discharged and lowered into the hold before another tub could be raised to the scales, between ten and fifteen minutes would be occupied in weighing a round of tubs (pp. 861, 691).

When weights would be taken upon a hanging scale, the same procedure would be gone through excepting that it would be unnecessary for any men to leave the hold of the barge.

It will thus be seen that when weights were called, the men in the hold of the ship were af-

forded ample opportunity, if they desired, to so load the tubs that were to be weighed that their weight would not be representative of the tubs that were not weighed. That this opportunity thus afforded them was not only taken advantage of by the men, but that such conduct directly resulted from positive instructions emanating from the defendant Mills, with a knowledge of the defendant Smith, cannot be gainsaid in the face of the record. That the buckets were not evenly filled and when weighed, were excessively overloaded, is demonstrated not only by the existence of the overage itself but by the positive and convincing evidence of the witnesses.

WEIGHTS INFREQUENTLY TAKEN.

According to the testimony of David Powers:

“The custom-house weighers and the Pacific Mail Steamship Company weighers would take about three weights a day, and sometimes four or five, and then they would take an average and fill in the other weights and tally the tubs that went up during the day” (p. 688).

On cross-examination, in stating what he observed with reference to the frequency of taking weights when he was first employed by Mr. Mills in 1902, he testified:

“I noticed right away that while it was supposed to be the custom to weigh one bucket in every fifteen, as a matter of fact that was not done. ‘A blind man could see that through spectacles’. I became aware of it the first few days I was there * * *” (p. 737).

Edward Powers, in giving evidence upon this subject, said:

“Generally, it was the practice while I was on the barges to weigh a round of tubs. Some weighers would take one round in every 15, and some about once in every three or four hours. It depended altogether upon the personnel of the weigher. The general practice of the Government weighers was to take a round of weights about three to five times a day. I would say that the maximum time intervening between the taking of weights would be three or four hours. That was quite frequently the custom pursued by the weighers” (p. 858).

And again:

“The weights would be taken at night-time the same as in the daytime. I know nothing about the number of weights that would be taken at night-time during the two years when I was dumping. When I was hatch-tender, prior to the fire in San Francisco, weights would be taken ever two or three or four hours. I have never known them to take weights only once or twice during the night. Sometimes they would hoist about 20 tubs an hour and sometimes maybe 80 tubs an hour. The taking of weights every two or three or four hours would occur whether the tubs were moving rapidly or slowly” (p. 859).

And still later:

“Q. You have testified, Mr. Powers, that weights would sometimes not be taken for 3 or 4 hours, upon one of these barges; is that true?

A. That is true.

Q. Is it not a fact that in those instances, or rather, in a great many of those instances, the tubs which were not weighed did not con-

tain as much coal as the tubs which were weighed?

A. That is true" (p. 864).

This testimony was directly corroborated by Special Agent John W. Smith, who, on the night of December 18, in company with David Powers and Mr. Enlow, acting under instructions from Mr. Tidwell, made observations relative to the coaling of the "Korea" by the barge "Wellington". They remained at their station making observations from 7 o'clock in the evening until 5 the next morning, excepting from 12 to 1:30 and for half to three-quarters of an hour between 3 and 4 o'clock (pp. 1004-5). Between 7:30 and 12 o'clock, but two weights were taken (p. 1005). Between half past one and 5 o'clock but one weight was taken (p. 1006). According to Enlow, they remained on watch until 6 o'clock the next morning, leaving at midnight to get something to eat, during which time hoisting operations were suspended, and also leaving again for a short time to investigate a case of smuggling (p. 1049). He stated that there were two weights taken that night between 7 o'clock and 12 o'clock, four tubs being weighed at 8:30 and four at 11:10 P. M. Only one weight was taken between 1 o'clock and 6 o'clock, when four tubs were weighed at 2 A. M. (p. 1050).

This testimony was directly corroborated by David Powers, the third man present that night, who said:

"Three weights were taken that night, and only three, that is, from six o'clock at night until six o'clock in the morning" (p. 709).

And according to the testimony of Jim Balestra, no more than two or three weights a day would be taken, and at night ordinarily but one weight would be taken, he saying:

“While I was thus working as a shoveler on the barges I was familiar with the manner coal was hoisted from the hold of a barge and dumped into the ships or liners. The frequency with which weights would be taken by the custom-house weighers varied. I would say that normally it would be about two or three weights a day. At night we generally took one weight just after we started to work and another one before we got through in the morning. When I worked in the daytime I commenced at seven o’clock, and worked until twelve o’clock, and then started at one and worked until five. When I was on overtime I sometimes worked all night” (pp. 1118-1119).

A similar version of the frequency with which weights were taken was given by Tony Belish, he stating:

“Sometimes weights would be taken four or five times a day and sometimes three times a day. At night weights would be taken from two to four times” (pp. 1136-1137).

The number of weights that were taken during the daytime, while the “Korea” was being coaled by the “Wellington” were not as frequent as they should be. David Powers says:

“I don’t believe they took four rounds out of sixty. I think the tubs were going up at the rate of about sixty an hour. They weighed tubs four in succession. They would weigh about one in ninety. My best judgment is that about an hour and a half elapsed between the weights” (p. 818).

It also appears that Enlow made observations upon other occasions, and states that on January 6, 1913, while watching the operations of the barge "Comanche" discharging into the "Siberia", but one weight was taken from 1 P. M. to 3 P. M. (p. 1051).

The testimony of Parks, the official weigher of the Pacific Mail Steamship Company, itself would tend to show that the Government weigher was often absent because we find that not only were comparisons frequently made while coal was being discharged, but at the end of each day they would go over their respective books and reach some agreement as to weights, Parks stating:

"Q. How often did you compare with the custom-house weigher your figures, either as to the weights or as to the number of tubs that were hoisted?

A. About every few minutes, about 5 or 10 minutes, or if he was not very close to me a signal would signify how many tubs he had, and so we compared it.

Q. Will you state whether or not you compared with the custom-house weigher at the close of the day the total tonnage that had been hoisted on the steamer?

A. Yes, sir, we make up our books at 5 o'clock and we both agree as to the amount and everything is correct" (p. 1523).

Further along in his cross-examination it was shown that according to his tabulations, a particular tub would contain a certain quantity of coal when weighed and when next weighed would contain the same quantity of coal, even to a pound. Upon other

occasions a particular tub, each time it was weighed, would apparently have in it an exact ton (p. 1515). These figures are consistent with the Government's evidence that weights were from time to time filled in.

LIGHTS AT NIGHT.

A considerable quantity of the coal supplied to vessels would be discharged at night. During these operations but few lights would be located upon the barge; only a sufficient number would be used to permit the operations to proceed. Concerning this matter, David Powers testified:

"A man would have to stand right over the hatch at night in order to see the contents of the tubs. As to lights, the Western Fuel Company owned about four or five lanterns, and the steamship company, I think, would produce one light, an electric light, which was located up high so that the engineer could see the bumper. Sometimes there would be two lights up at the bumper. The actual height of the bumper, and therefore of the lights, would depend upon the height of the ship; so that sometimes you might be close down to the deck, and at other times 50 or 60 feet from the bottom of the barge. There were no lights other than those which I have mentioned, except a small lantern which Mr. Parks used to use to look at the scale. The lanterns on the barges were ordinary coal oil and swinging lanterns, and were the only lights in the vicinity of the hatchway except the electric lights that I have mentioned. It would not be possible to see the amount of coal in the tubs at night except when the tubs were actually being weighed, unless a person were standing in the immediate vicinity of the hatchway" (pp. 706-7).

Edward Powers' knowledge upon this subject is also instructive:

"When we were coaling a ship at night we had some bulkhead lanterns there, that is, ordinary lamps fitted into a box or cage; and the steamer which we were coaling was supplied with electric lights on the side of the ship, and an electric light cluster shone right into the hatch. There were also some lights up near the falls near the bunker. I hardly think it would be possible for a person who was on the deck of the barge and removed some distance from the hatchway to see the contents of the tubs as they would rise at night" (pp. 864-865).

Further along, in again referring to the matter, he said:

"Generally, when we were discharging barges at night, electric lights were supplied by the steamship company, that would throw the light into the hold of the barge. There were also the box lanterns belonging to the Western Fuel Company. The electric cluster was arranged as the hatch-tender or the custom-house weigher wished it to be. Usually that was in such a way that it would throw the light down into the hold of the barge. I would put one of the box lanterns in each wing of the barge where the men would be working, and also one in the hoist so that the engineers could see on each trip the proper time for dumping the tub. The light sometimes went out. In such event they went on the work just the same so long as the box lanterns were lit. If a man were standing right at the hatch of the barge, he could thus, with all the lights going, see how the tubs were loaded as they ascended" (p. 917).

On the night upon which Smith, Enlow and Powers were watching the "Korea" coal, there was not sufficient light for them to see into the hatch of the barge (p. 1005).

That the Western Fuel Company were as economical with their lights as they were with their coal is apparent from the testimony of Robert Sass, a shoveler. He said:

"Sometimes I worked at night on the barges. I could not see the quantity of coal in the tubs, however, very well from my station in the engine-room. Regarding the lights, I would say that I have seen times when they would have to have two clusters of electric lights from off the steamer, and a couple of box lamps. The Western Fuel Company furnished the latter, while the electric lights came from the steamer. *A man would have to stand right over the hatch at night in order to see the coal contained in the tubs*" (p. 1098).

Later on, on cross-examination, the same witness said:

"It is about 25 feet from my engine-room up to the hatch-way. At night time they always had a cluster of electric lights shining down into the hold below. There are also two box lanterns placed by the custom-house men, one forward and one aft. While standing twenty-five feet away, as the buckets went up, you could not see what was going on at night, as to whether they were filled or not, but you could see the bucket when it was put on the scales, where there was a lantern" (p. 1102).

USUAL LOCATION OF GOVERNMENT WEIGHER.

In view of the situation shown by the evidence, it is obvious that in the proper discharge of his duties the government weigher would have to remain while on duty, constantly at the hatch of the barge, watching the tubs as they would be hoisted out of the hold of the barge. Unless he were in this position, it would be impossible for him to tell whether the tubs were, or were not evenly filled. That this was not the position ordinarily occupied by him, particularly at night when more care and caution was required, is made clear.

Touching this matter, Edward Powers testified:

“When weights were not being taken the weigher would sometimes be right at the hatch, and sometimes he would be walking around the deck of the barge, and sometimes smoking. Once in a while they would go inside of the cabin. When coal had to be weighed at night and it was raining, some of the weighers stayed right at the hatch. The others of them went into the engine-room shed, and stayed there sometimes for some time” (pp. 858-9).

“If the Government weigher were in the engine-room, and particularly at night, I doubt whether he would be able to see the quantity of coal which was contained in the tubs that were hoisted from time to time and were not weighed, but I would not say that he could not see them. I have never seen the Government weigher in the cabin. I have seen him walking up and down the barge. I have not watched him closely enough to say whether he would turn around when each tub came up. It is true that he would sit down upon the barge smoking while this hoisting was going on” (pp. 858-9).

David Powers, in showing the position sometimes occupied by the government weigher, said:

“Sometimes it rained at night. The custom-house weigher would ordinarily stand near the boiler at night to keep warm or else in the cabin. On other occasions he would walk up and down the barge. The Government weigher would not station himself near the hatchway except when the tubs were actually being weighed” (p. 707).

Upon being cross-examined as to who these weighers were, David Powers names Mr. Hoberg, and upon being pressed said:

“Q. Is he the only man that you can name?

A. No; if I went ahead and named them, I would name them all, if I could remember all their names.

Q. Name them?

A. I don't remember all their names.

Q. Well, does that apply to every custom-house weigher, the answer that you have made with respect to Mr. Hoburg, does that apply to every custom-house weigher that you have seen down there?

A. It applies to the majority of all of them, I guess.

Q. Now, I am just going to ask you the question once again that I asked you: Is there any other one of them that you can name outside of him?

A. I said there was all of them, or pretty near all of them. Of course, there are exceptions to the rule” (pp. 831-2).

While the witness, John W. Smith, on the night of December 18, was watching the “Korea” coal, it was impossible for him to see the government

weigher when the weights were not being taken, he stating:

“Four tubs were weighed upon each one of those two occasions when the weights were taken, one after the other. I do not know where the Government weigher was located when the weights were not taken. * * * I don't remember seeing the weigher around except when they were taking weights” (pp. 1005-6).

Enlow, watching with Smith, testified:

“On the night to which I have testified I could tell just where the Government weigher was located, but could not recognize him well. When weights were taken he came up to the middle hatch from up forward on the barge. When weights were not being taken, he would be just about where the bulkhead of the vessel would be. I remember seeing a lantern kept at that place. That was about 30 or 40 feet from the hatchway. I suppose the weigher was tallying coal. I could not, however, see him actually doing so” (p. 1051).

Of course the elevation of the tubs between the deck of the barge and the tripper could be observed from a considerable distance on account of the lights located near the place where the tub would dump (p. 1104), and while the tally of the tubs thus hoisted could be readily kept, as the evidence already shows, and this without conflict, the condition of these tubs, respecting the extent to which they were filled with coal, could not be determined.

Respecting the position of the weigher when weights were not being taken, the witness Robert Sass, who, for some time was employed as engi-

neer on four of the barges, and at other times tended hatch, testified:

“When weights would not be taken the weighers would sometimes walk up and down the deck, and sometimes come into the engine-room to warm themselves. I was in the engine-room myself. At other times, the weigher would sit around the hatch watching. He would not sit in the engine-room very long, perhaps five or ten or fifteen minutes at a spell. You could only see a part of the deck of the barge from where I was operating my engine, because it was so dark” (pp. 1098-99).

And as to what would occur in rainy weather, is also shown:

“It was generally at night or in rainy weather that the United States weigher on the barges would go into the engine-room and stay ten or fifteen minutes to warm himself” (p. 1102).

It might be well for the court to remember that not a single assistant weigher was called to the stand by the defendants, either to testify to the proper performance by him of his duties, or to assert that when engaged in the weighing of coal on barges, his location was such that the contents of the tubs and the extent to which they were filled, could be noticed.

**ABILITY OF SHOVELERS TO PERFORM WORK DETERMINED
BY RECORD SHOWING OUT-TURN WEIGHT OF COAL.**

It occasionally happened that work would become slack and that consequently some of the stevedores and shovelers who, by the way were paid by the

hour, would be laid off. This would be done by the hatch-tender, acting under the direction of Mills (p. 837). At other times the men would be laid off because they could not do their work. As to what was meant by this phrase, the witness, David Powers, testified:

“Q. That is just what I am trying to get at; you say they could not do their work; in what respect could they not do their work?

A. Well, they could not get out the amount of coal that was supposed to have been gotten out.

* * * * *

Q. That is, because he was not able to do his work, not able to fill the loads sufficiently; how often did that occur?

A. Oh, at different times that I was there.

Q. And do you know that of your own knowledge, that men were discharged for that reason?

A. Yes, sir” (pp. 839-840).

The method of determining whether a shoveler was able to do his work was aptly described by the witness, Edward Powers, as follows:

“Q. How would you determine the quantity of coal which each gang of men handled from time to time? Would it be determined by the number of tubs that went up or by the weight of the coal that was hoisted during the time each gang was on duty?

A. By the weight of the coal.

Q. And it is a fact, is it not, Mr. Powers, that the weight of the coal which was discharged by each particular gang *was determined by the weight of the buckets which in fact were weighed?*

A. *That is true.*

Q. And by those buckets alone, taken as an average; is that true?

A. That is true'' (pp. 975-6).

And again:

“Q. Let me put one other question to you upon that subject, Mr. Powers: Is it not a fact that if a man employed upon one of these barges as a shoveler was not able to shovel the amount of coal which the hatch-tender or the Western Fuel Company believed he should shovel, ascertained by the outturn or Government weight of the coal shoveled, that he would be discharged; in other words he would be, to use the language of the barge, given the hook instead of being permitted to meet the hook?

A. They were supposed to fire him if they could get a better man in his place'' (pp. 978-9).

Inasmuch as the weight of coal discharged from a barge was determined by average weights, it is obvious that if the buckets that were weighed were substantially filled, or filled to their uttermost, while of considerable importance to the Western Fuel Company it would be of little consequence to the shovelers in the hold of the barge whether the tubs not weighed were adequately or inadequately filled. If the ability of the shovelers to properly discharge their duty depended altogether, as the undisputed evidence shows, upon the record of the coal discharged from the barge, and the tubs that were weighed were kept well filled, the permanency of their respective positions was assured to them however short of honest weight the remaining tubs were loaded.

While manifestly fraudulent practices will not be imputed merely because of opportunity alone, yet, as we will presently see, the facts in this case establish not only that the opportunity thus afforded was embraced, but that such action was compelled in order to avoid immediate discharge. The hatch-tender who, as the evidence will show, directly or indirectly coerced the shovelers to load tubs weighed and underfill tubs not to be weighed, was the immediate representative of defendants, Smith and Mills. With him rested, at least in the first instance, the permanency of the shovelers' employment (p. 1315).

FULL DUTY NOT PERFORMED BY UNITED STATES WEIGHER.

It of course is not claimed by the Government that every assistant weigher in its employ, engaged in weighing coal that was supplied into vessels, with benefit of draw-back, or into transports or other government vessels, was dishonest or acted dishonestly, or was guilty of negligence. It is likewise not claimed by the Government that every time a bucket was weighed, it did not adequately portray the condition of the tubs that were not weighed, nor is it the Government's attitude that every tub of coal that was not weighed was inadequately filled. That some of the weighers did not conscientiously discharge the duties imposed upon them by virtue of their employment; that other government weighers were derelict in the discharge of their duties; and that yet others were guilty of the grossest kind of

negligence, is attested not only by the overages themselves, but by the difference in the amount of overages existing in concrete and specific cases.

It is needless to assert that in the proper discharge of his duties, the position of the weigher should have been at the hatch. Walking up and down the deck of a barge, locating himself in the cabin, or behind the bulkhead, or sitting down at either end of the barge while engaged in a quiet smoke, did not comport with the proper or faithful discharge of his duties. Nor was he, while occupying these voluntarily assumed positions upon the barge, afforded the opportunity of observing the very conditions, to acquire knowledge of which, he was employed.

This condition of lassitude and inertia on the part of the weighers is readily traceable to the practice of the Western Fuel Company secretly, yet consistently, carried on against the regulations of the Government, in paying to the assistant weighers \$1 an hour as overtime, to which they were not entitled, and for which overtime, they were allowed a corresponding period of relaxation by the Government. For a number of years prior to 1906, the assistant weighers were paid a per diem, that is, they were paid for the days they actually worked. Subsequently, between March, 1906 and 1911, they were placed upon a regular salary, payable in monthly installments, with Sunday off (pp. 1279-80). For a number of years prior to 1906, when the weighers worked overtime, they presented bills to the surveyor, which

were by him turned over to his cashier for collection. As stated by Cook:

“The assistant weighers would be actually paid not by the importer direct, but through customs sources” (pp. 1274-6).

The witness Blinn, a deputy collector of customs, testified to the same point (pp. 1272-3).

In March, 1906, an order was issued by the Department prohibiting this practice. Accordingly, from that time forward, until 1911, no overtime would be allowed the assistant weighers, but they would be entitled to time off for all extra work they performed (p. 1273). Between March, 1906 and 1911, whenever a weigher did work overtime, he actually received, and took his time off. Cook testified positively upon this matter, he stating:

“No compensation was paid in money to the assistant weighers between March, 1906, and January, 1911, for night overtime service. We were, however, authorized by the department to compensate an assistant weigher for such work as he rendered at night by allowing him a day off subsequently. *I know as a fact that such an allowance would be actually made and taken advantage of by the weigher*” (pp. 1274-5).

It also appears from the testimony of this witness that the Government received no compensation for any time off that it allowed its assistant weighers (p. 1275).

The regulations of the customs department, of which the court will take judicial notice,

Caha v. U. S., 152 U. S. 211; 38 Law Ed. 415,

require the weighers to make an affidavit when collecting their salary, the statements in which are inconsistent with the idea that overtime or gratuities have been received by them from the importer (p. 1273). Notwithstanding this situation, payments were made from time to time by the Western Fuel Company, to assistant customs weighers, representing overtime, for which time off was given by the Government. According to Bud Hopkins, an employee of the Western Fuel Company, this overtime amounted to between \$250 and \$300 a year (p. 1281). An examination of one of the time books, however, disclosed that \$240.50 had been paid for this service between June 1 and December 31, 1910 (p. 1281).

That these payments were wrongful and known to be such, can be readily concluded from the manner in which they were made, and the character of records kept by the Western Fuel Company concerning them. Speaking to this subject, Bud Hopkins testified:

"I have knowledge concerning payments made to assistant customs weighers by the company representing compensation for overtime between the month of June, 1907, and the early part of 1911. The money was paid to the assistant weighers by the defendant, Eddie Mayer. He in turn obtained the money from me in cash, and I got it from the cashier, I. H. Story. * * * I could not say whether Mr. Mayer took a receipt from the assistant weighers when he gave them this money. I kept the time for the stevedores, and paid them myself by cash, and I took a receipt

from the stevedores for each amount of cash thus paid. I kept regular weekly time-books. * * * When I paid an employee for the week he would sign his name on the time-book. Mr. Mayer would sign in the time-book for the money that I gave him to be by him paid as compensation to the assistant weighers. I have no recollection, however, of any assistant weigher signing his name to any one of these time-books for compensation paid him, or of his signing any other paper. * * * In most every case I used a particular number in the time-book opposite which to insert the compensation paid by me to Mayer for these weighers, and that number was 96 as a rule but not necessarily 96. The dates appearing on the time-books would be those on which the money was paid, and that day would be a Saturday" (pp. 1280-2).

The defendant Mayer likewise admitted the existence of the practice complained of. After testifying to the receipt of the money from Paymaster Hopkins, whose duty it was to pay to the company's employees their salaries, he stated:

"Q. When you made the payments of money for overtime to the custom-house weighers, did you make any memorandum of the fact of the payment?

A. Sure; I put it in my book to get my money.

Q. In what book did you make a memorandum?

A. I just put it on a piece of paper and gave it to the timekeeper.

Q. And the timekeeper made an entry in his book, did he?

A. Yes, sir.

Q. And during those years; between 1906 and 1912, when the weighers did work over-

time, and you would be on the bunkers, you always paid them the overtime, did you not?

A. I did, yes, sir.

Q. At that time, did you know that the weighers who worked overtime were always allowed by the Government a day off for overtime at night?

A. No, sir.

Q. When you paid this overtime to the weighers, did they sign any receipt or acknowledgment of the payment?

A. No, sir.

Q. When you made a report to the paymaster of the payments of overtime did you give the names of the weighers?

A. No, sir.

Q. Whose name was signed to the memorandum that you gave to the paymaster?

A. My name.

Q. Is it not a fact that you signed your name to the time-book showing the payment?

A. Yes, sir, I signed the pay-roll for that money.

Q. Why didn't you insert the name of the weigher to whom you gave this overtime?

A. Because it was not the custom" (pp. 2022-5).

The donation account already referred to discloses several gratuities in the nature of coal delivered to some of the weighers.

OVERAGES ON BARGES DUE TO FRAUDULENT CONDUCT IN FILLING WITH HEAVY COAL THE WEIGHED TUBS, WHILE THOSE THAT WERE NOT WEIGHED WERE BUT PARTIALLY FILLED.

Up to this point we have followed the coal from its initial discharge at the bunkers of the Western Fuel Company into the barges, and from the barges

into the bunkers of the vessels to which it was delivered,—vessels with and without benefit of drawback, transports and other Government vessels. We have shown how coal thus laden upon the barges, oft-times within sixty-eight hours, at other times within four or five days, and still at other times within ten days or two weeks, would apparently increase in weight five, ten, fifteen, twenty, and in some instances thirty and forty per cent beyond its actual weight at the time it was checked into the barges. We have pointed out how the engineers on the vessels thus coaled complained to their superior officers and to those in authority in the Western Fuel Company, without avail, and how the Western Fuel Company through gratuities consisting of tons of coal and small amounts of cash effectually sealed the lips of employees and of officers of the Pacific Mail Steamship Company, so that no outcry or protest against the frauds being perpetrated would emanate from them. We have even seen how some of the Government employees, sworn to faithfully perform the duties incident to their employment, failed to measure up to the required standard, and we have seen how they too became tainted by the venom resulting from occasional tons of coal and moneys paid by way of overtime.

We are now about to develop the story showing how these overages were brought about, and demonstrate by evidence, the strength of which cannot be diminished or its effect overcome by arguments imputing motives of hostility to Government wit-

nesses, that they were caused, not by moisture content or oxidation, but by specific criminal acts of fraud perpetrated in furtherance of the conspiracy set forth in the indictment.

First, however, a word as to the Powers Brothers.

The Powers Brothers.

In the brief filed by the plaintiffs in error, David Powers is characterized as a "spy", an "informer", and a witness "bought and paid for" by the Government. Of course counsel recognize the futility of hurling epithets of like character against Edward Powers, so they content themselves with asserting that he was "bitterly hostile against defendants". Likewise we realize that arguments of this character are entitled to no consideration at the hands of an appellate tribunal. Eloquence couched in such language should be confined to the argument made to the jury, in which, in the instant case, it was freely indulged. The hostility of a witness, his motives, his expectations, if any, his demeanor upon the stand, are all matters, the consideration of which is purely within the province of the jury. Its conclusion upon these matters is final and conclusive. Unless the evidence of a witness is so inherently improbable as to be impossible of belief, it cannot be rejected by this court. In this case such a situation, however, is not presented by the record, because whatever may have been David Powers' shortcomings, his testimony is not only believable, and inherently probable, but is vouched for and corrobor-

ated by a mass of other evidence, the verity of which cannot be successfully denied.

Neither the United States Government, nor any of its officers, is engaged in the business of buying perjured evidence. The assertion that Powers was "bought and paid for" is a mere gratuity flung into the argument by counsel for plaintiffs in error, in an apparent endeavor to lessen the effect of his testimony, without foundation and without reason. It is true that David Powers testified that Mr. Tidwell spoke to him about the payment of the reward authorized by the statute, but this was not until after Powers had completely revealed the facts within his knowledge. Before calling upon Mr. Tidwell, Powers had disclosed to Mr. McMasters, Mr. Gleason and Mr. Mayer, reporters upon local newspapers, the major part of the facts which were known to him about the practices of the Western Fuel Company (p. 840). He believed he was about to be called before the Grand Jury to be questioned concerning them. It was at the suggestion of Mr. McMasters that he called upon Mr. Tidwell and related to him what he knew (p. 840). And that this statement preceded any knowledge on his part that under the statutes of the United States he might participate in a reward, or would otherwise be benefited, is conclusively shown by testimony which is not contradicted.

Says Mr. Powers:

"Q. You have said upon cross-examination that Mr. Tidwell did speak with you concern-

ing your receiving a proportion of the amount of money, being the duties on the value of the coal out of which the United States had been defrauded, and that in your mind, if you were paid that reward, you would get in the neighborhood of \$7,000, or one-quarter of some \$28,000?

A. Yes, sir.

Q. Before Mr. Tidwell touched upon that subject either directly or indirectly, had you narrated to him all the circumstances and facts within your knowledge relating to this particular controversy?

A. Yes, sir'' (pp. 840-1).

But whatever may be said about the willingness of David Powers to testify as a witness in this case, the circumstances of which were fully narrated by him and not contradicted, no legitimate criticism of any kind can be leveled against the character, reputation, fairness or truthfulness of his brother, Edward Powers. This witness had been under subpoena by the Government for over one year, because of which fact he had been unable at times to accept employment on vessels leaving San Francisco. Prior to the moment he was called to the stand he had positively and unequivocally refused to give the Government any information of any kind relative to any of the facts involved in this controversy (p. 853). He had been examined before the grand jury and while there, his attitude was that of an unwilling witness. That he was friendly disposed towards the defendants is not only shown by his evidence and demeanor while on the stand but by the

circumstance that at the conclusion of his examination before the grand jury, upon the invitation of Secretary Norcross, he voluntarily went to the office of the attorneys for the defendants and there responded to every question that was put to him. This situation, disclosed by his testimony, was not even attempted to be contradicted or disputed (pp. 965-970).

After testifying to his acquaintance with the various defendants, and the friendly relations existing between them, he said:

“Q. Prior to the moment you took the stand here, which was within the last few moments, had you ever made any statement of what you knew concerning this case to the attorneys representing Government?

A. I have.

Q. When?

A. At the office of Olney, McCutchen & Olney, Mr. Moore being present.

Q. I am talking about the Government's attorneys now.

A. No. (Last question repeated by reporter.)

A. I did not.

Q. You did not?

A. No.

Q. Have you been requested upon various occasions by the attorneys representing the Government to advise them, or one of them, of the facts within your knowledge relating to this case?

A. I have” (pp. 853-854).

That he was an unwilling and hostile witness, so far as the Government was concerned, until his

lips were unsealed and his knowledge released by a tactless cross-examination, can be readily ascertained by reading his testimony. By evasive replies, by refusing to volunteer, by failing to give definite responses to pointed questions, there was manifested throughout his direct examination a determination not to voluntarily permit any word to escape him which might have a tendency to injure any one of the defendants. That even the hope of reward if he divulged what he knew failed to remove this seal of silence from his lips, or cause him to become disloyal to the traditions of his race is evident from one phase of his testimony, developed upon cross-examination, from which we quote:

“Mr. Tidwell has said something to me with respect to a reward. He asked me to tell him something about the Western Fuel Company, and I refused and he went on to state that there was a reward offered for any informer, and I told him neither he nor the United States could make an informer of me; that is the stand I took. That conversation took place in January or February 1913; it may be December. He only spoke to me once about the matter of a reward” (p. 956).

And later, he said:

“Q. You have now related to us all that has been said as between you and Mr. Tidwell in regard to any reward?

A. Well, when Mr. Tidwell told me there was a reward and he got his answer, he never broached the subject again” (pp. 960-961).

This witness not only was hostile to the Government, but likewise was unfriendly towards his own

brother, David G. Powers, evidently because he felt that he should not have volunteered information against the defendants (p. 953).

According to the evidence already impressed upon the recollection of the court, ordinarily when the Government weigher indicated that weights were about to be taken, and the call of "On the scales" was communicated to the shovelers in the hold of the barge, a tub was being either elevated to the tripper or, having been dumped, was descending. In some instances by positive instructions, in others by signals from the hatch-tender, and in still others by complaints to the men when tubs to be weighed were not filled to their uttermost, the men to whom was assigned the duty of filling the tubs realized that to retain their positions it was essential that, where it could be safely accomplished, the tubs that were to be weighed should be filled to their utmost with the heaviest kind of coal, while those that were not to be weighed should be but partially loaded.

Cause of Averages.

The weight of the coal discharged from the barges was determined by averages. While of course it could not be expected that each tub would be so loaded that the weights of all tubs would agree,

nevertheless, if all of the tubs were kept evenly filled—those that were not weighed as well as those that were weighed—the average weights determined by the weighing of tubs, whether one out of fifteen or four out of sixty, would approximate the actual weight of all of the coal. In other words, whether any deviation from actual weights would occur, in weighing the tubs, it was something that would finally even itself out.

Secretary Norcross of the Western Fuel Company put this proposition in apt and convincing language. We quote from his testimony:

“Even though the coal from the barges is weighed by averaging the tubs, if the weights are taken fairly, honestly and accurately, the tubs which are weighed will give approximately the weight of the tubs which are not taken. So that even though the weight of the coal discharged from barges is an average weight, that average weight will, if all the tubs are similarly or approximately filled, represent almost the actual weight” (p. 243).

The manner in which coal would be discharged from the barges, resulting in the overages disclosed by Mills' books, was succinctly pointed out in the evidence of David G. Powers. As far back as 1902 to 1904, according to this witness,

“The method pursued by the Western Fuel Company in such discharge from barge to vessels was as follows: the tubs would go up about three-quarters full, and when they were being weighed they would be heaping full” (pp. 687-688).

Later on, when employed by the Western Fuel Company, the cause for the overage was again pointed out by him. Upon this subject he said:

“The difference between the method pursued in taking coal out of the hold when a round of tubs was being weighed, and the method pursued in hoisting the tubs and discharging their contents into the boat was that the buckets were being discharged into the steamer, they were going up about three-quarters full and there were about 120 tubs an hour, that is about two a minute, or 1120 lbs. net weight. * * * I would frequently observe that after the cry ‘On the scales’ had been given the coal shovelers would go right into the fine coal; one man would shovel in fine coal and the other man would put in the lumps, I mean the fine coal to fill in the spaces, and they would fill the tub to overflowing and put it on the scales” (pp. 691-692).

That a tub loaded with both fine and lump coal would weigh the most was attested by the witness Parr, one of the experts afterwards called by the defendants, who claimed to have made experiments upon which this evidence was given (p. 1628). It was also testified to by Edward Powers (p. 872).

The court will remember that when coal was discharged into the barge, the fine coal ran along the center line, the lump coal falling to the sides and wings (p. 870). It was into this fine coal that the shovelers would go when tubs were to be placed upon the scales. The witness David Powers further testifying:

“When coal was not being weighed the shovelers would always try to get the wing coal,

the lump coal, first, taking only such fine coal as came along incidentally. There would be two tubs working forward and two working aft. When weights were not being taken a few lumps would be shoved into the buckets and a few shovels of fine coal, and they would go up about three-quarters full. As to the method in which the tubs were loaded, they were turned on their sides, and the coal scooped in, but when weights were taken they would shovel the coal into the tubs. When the tubs were not being weighed the coal was scooped into them, and they would go up half full. *When the tubs were being weighed one shoveler would shovel in the fine coal and the other would throw in the lumps. That was an every day occurrence*" (pp. 693-694).

At the time David Powers became hatch-tender, the defendant Edward J. Smith became checker on the barges. As to what then occurred Powers testified:

"When the Government weigher wanted a weight, he would communicate his desire to Mr. Smith. Smith would holler, 'On the scales'. I could see the tubs of coal before they would be hoisted to the scales when a weight was desired and also the tubs to be hoisted when no weights were being taken. I could also see the shovelers down in the hold of the barge. When the tubs were coming up and being discharged into the steamer without being weighed they were about three-quarters full; but when they were being placed on the scales they would be heaping up, and this would occur in the presence of the defendant, E. J. Smith. *When tubs were being weighed the shovelers would always put fine coal in and lumps; one man would throw lumps in and another man fine coal*" (p. 700).

In describing his experience while watching the "Korea" being coaled on the night of December 18th, 1911, in company with agents Smith and Enlow, he further testified:

"When the tubs were being weighed they were overloaded, heaping full, and when they were not being weighed they went up very light. Sometimes, indeed, they had to send the tubs back to put more coal in them, because they did not contain enough coal to trip at the bumper" (p. 709).

As stated by this witness, if the bucket were less than three-quarters filled, unless the coal was spread towards the lip it would not dump at the tripper, consequently it would have to be returned to the hold to have more coal placed in it.

Respecting the discharge into the "Korea" this witness, on cross-examination, further testified:

"You could see the tub when it hit the bumper when the light flashed on it. We could see the tubs and what was in them when they were overflowing at the time the weights were being taken; but you could not see exactly the contents of the tubs otherwise until they got right up to the bumper and the electric light" (pp. 835-836).

The evidence last given is corroborated by the testimony of Special Agents John W. Smith and E. D. Enlow. The former had observed the coaling of the "Korea" during the day time on the 16th and 17th of December, 1912, and then again on the afternoon and night of the 18th and the early

morning of the 19th (pp. 1001-2). Speaking of the condition of the tubs he said:

“The tubs which were weighed were in every case heaping full, well rounded out, and the tubs which were not weighed were hardly ever rounded out. To my recollection none of them were as full as the ones that were weighed. In the case of the tubs that were not weighed, the coal would sometimes be below the top of the tub. It would quite often be that way. To my recollection, though, I could not say positively none of the tubs that were not weighed were rounded out as full as the ones which were weighed. Referring still to the daytime, it appeared to me that the tubs that were weighed had more fine coal in them than the tubs that were not weighed” (pp. 1003-4).

This testimony related to what he had seen in the day time. As to what occurred on the night visit he testified:

“On the night of the 18th, when weights were not being taken, some of the buckets were only fairly filled. Some of them, to the best of my recollection, were not half full. *There were several times when they had difficulty tripping the tubs at the point of discharge. Sometimes I could not see the quantity of coal in the tubs upon these occasions when there was difficulty in tripping them.* There was not enough coal in the tubs for me to see it, though I could see at least a foot down in the tub. In the day time the tubs that were not weighed were better filled than they were at night” (p. 1006).

He then describes the condition of the tubs during the early morning hours of the 19th.

“The weighed tubs were well filled, and the unweighed tubs were not well filled. The situation was about the same in this regard as in the earlier part of the night, except that in the morning near five o’clock the unweighed tubs appeared to me to be better filled when they came up” (p. 1006).

The quality of coal contained in the tubs, as to fines and lumps, was brought out on the cross-examination of this witness, his testimony there being:

“The weighed tubs were all well rounded out, and had a good deal of fine coal in them. I could see them dumping. That is the only way I know the character of the coal. Some of the tubs that were weighed had more lumps in them than others; but, in taking them one with another I would say that they were filled with about the same character of coal and were well rounded out; that is to say, they contained coarse and fine coal. Some had more fine coal than others—very much more” (p. 1009).

According to Enlow, on the afternoon of December 17,

“When they took the weight the tubs were well filled, and we saw but little lump coal in them; but when they were not weighed we saw quite a number go up that were not well filled,—a number of times, for instance, you might take a two-bushel sack or coal and empty it in the tub without making it any fuller than when they were weighed. Occasionally, therefore, there might be a difference of a sack of coal between the tubs that were and were not weighed respectively” (pp. 1048-9).

Describing his observations at night, on the occasion referred to, he said:

“I could, from the position occupied by me on the bridge, see the contents of the tubs of coal. I noticed that when they were weighed they were well filled, and when they were not weighed there were many of them that were like in the daytime, only worse. We looked down on the tubs from where we were, and we could see down at least six or eight inches along the side of the tubs. A sack or two of coal could be poured in some of them without running over” (p. 1050).

Edward Powers, on account of the various positions of authority occupied by him while employed by the Western Fuel Company, was one of the Government's most important witnesses. As we before observed, his desire to shield the defendants crops out at every angle of his testimony, until stirred into activity upon cross-examination. To properly present the material features of this witness' testimony upon the particular subject under discussion, in view of his manifested attitude of friendliness to the defendants, at the risk of being tiresome, we believe it essential to quote liberally from the record.

Upon being questioned as to the extent to which tubs were filled when weighed, the witness testified:

“Q. To what extent, if I may use the expression, were these tubs filled during that period of time when they were put upon the scales to be weighed?

A. They were filled.

Q. You say they were filled; to what extent were they filled?

A. That is the only way I can explain it, they were filled.

Q. There might be two ways of filling a tub. Is it not a fact, Mr. Powers—well, I will withdraw that. Just go on and state how they were filled, to what extent they were filled, whether they were filled by being just level with the top or whether they were filled to overflowing?

A. Sometimes they were filled to overflowing.

Q. During the time that you were hatch-tender there, Mr. Powers, what, if anything, did you see done with the tubs which were contained in the hold of these barges with reference to putting more coal in the tubs after the tubs were originally filled and before they were weighed?

A. Sometimes they would put more in when they were weighed.

Q. Is it not a fact, Mr. Powers, that that was a frequent occurrence?

A. It was.

Q. During that same period of time to what extent were the tubs ordinarily filled with coal which in fact were not weighed?

A. They were pretty well filled.

Q. You say they were pretty well filled; what do you mean by saying they were pretty well filled?

A. There was not much difference between them and the tubs that were weighed.

Q. You say there was not much difference; what difference was there?

A. There might be a few shovelfuls difference.

Q. Did you ever notice any difference between these tubs more than a few shovels full?

A. Yes, sir, I did.

Q. Upon how many occasions did you notice that?

A. When the customs man made me take it off the top, made me scrape the top off.

Q. How frequently did that occur?

A. Several times'' (pp. 861-2).

* * * * *

“Q. That is not the question I asked of you. You have testified that the tubs that were weighed were well filled; is it not true that you have frequently during that time that you were hatch-tender seen buckets that were weighed filled to their uttermost and buckets that were not weighed filled to such an extent only that the coal sometimes would not reach the tops of the tubs; is not that true?

A. Once in a great while, yes, sir.

Q. Did not that frequently occur?

A. No, not so that you could not see the top. They were always pretty well filled'' (p. 863).

And later:

“Q. How frequently did you see these men put more coal into the buckets that were about to be weighed when weights would be called for?

A. I have seen them do it.

Q. Is it not the fact, Mr. Powers, that you have seen them do it frequently during the time you were hatch-tender.

A. I have seen them do it quite often.

Q. You have testified, Mr. Powers, that weights would sometimes not be taken for 3 or 4 hours, upon one of these barges; is that true?

A. That is true.

Q. Is it not a fact that in those instances, or rather, in a great many of those instances, the tubs which were not weighed did not contain as much coal as the tubs which were weighed?

A. That is true'' (p. 864).

Edward Powers manifested the same reluctance in disclosing the cause of the overage. After evading the question, he finally said:

“Q. Have you any idea at all upon the subject?

A. Very little.

Q. Well, very little; however small or infinitesimal that knowledge may be, Mr. Powers, we would like to have the benefit of it. What is your knowledge upon that subject, however small it may be?

A. The only information I have is they were loaded with so much coal and they overrun, that is all” (p. 880).

And after stating that Spring Valley moisture out of a hose helped a little, he finally said:

“I also thought that the method of weighing, that is to say, the custom of having some tubs go on the scales a little heavier than others, might be responsible for the overage. It is true that the overage, or a large part of it, was due to the fact that there was more coal in the tubs which were weighed than there was in the tubs which in fact were not weighed” pp. 881-2).

That the complaints of the engineers regarding shortages were not groundless, is also shown.

“Q. Now I will ask you why, in your judgment, or rather, why did you believe or did you think or conclude that there was justification for those complaints?

A. The fact that the barges overrun; they show in the book they overrun.

Q. And that indicated to your mind what?

A. Well, they were getting less coal than was charged to them” (p. 886).

The reason for the form of the question first put to the witness is shown by what precedes the evidence quoted, and is but another indication of his desire to withhold hurtful evidence against defendants.

It is quite evident that statements made by Mills that he did not want to have any trouble over there, referring to trouble with the weighers, and his statements to the hatch-tenders to keep the tubs filled, were only made in the presence of a Government weigher who was conscientiously discharging his duty, and then only for his benefit. This was shown upon cross-examination of the witness, Edward Powers:

“Q. Is it not a fact, Mr. Powers, that Mr. Mills used to say, whenever any of these matters would come up, or complaints come up, that he did not want any trouble over there, or not to have any trouble over there?

A. He would say not to have any trouble over there—yes, he said that.

Q. And is it not a fact that you heard him say to the hatch-tenders and to yourself to keep the tubs even?

A. Yes, sir, when the custom-house weighers were standing there, yes, sir.

Q. You do recall him saying that in the presence of the custom-house weighers, do you not?

A. I do” (p. 908).

That the overfilling of tubs that were weighed was due to wrongful practices was positively testified to by the witness on cross-examination.

“Q. Now, then, do you mean to be understood as testifying to this Court and jury that

there was any wrongful action on the part of those stevedores in the filling of those buckets or in the loading of those buckets that were hoisted during the discharge of those barges?

A. I do.

Q. And what is it?

A. Well, for the reason the report was rendered F. C. Mills and J. B. Smith every day stating that the barges had overrun, sometimes as high as 10, 20 and 30 and as high as 35 per cent, over what was loaded into the barges; therefore it showed conclusively that it was fraudulent, didn't it?

Q. I am questioning you, Mr. Witness. I am asking you what you saw there. Did you see anything down there, either during the time that you were acting as hatch-tender yourself or afterwards during the time that you were acting as assistant to the superintendent, leaving aside the Mills' books—perhaps they will be come to later—and confining you now to what you saw down there, what you observed, what did you see down there that you claim was wrongful action on the part of those stevedores?

A. I have already testified to the tubs, when they were weighed they were overloaded.

Q. Did you see them doing that?

A. Well, I seen them when I was standing on the deck of the barge, and the tubs was going up, and when they were in the process of being dumped, and there was not as much put in them as when they were put on the scales. And Mr. F. C. Mills standing on the deck saw it with me.

Q. Do you claim that they were overloaded intentionally and deliberately, by those stevedores?

A. In some cases, yes.

Q. Was that true, Mr. Powers, while you were acting as hatch-tender there?

A. It was.

Q. And how many cases did you observe of that kind during the time that you were employed as a hatch-tender for this company?

A. Numerous times.

Q. Numerous times. Did you ever tell the stevedores to do that?

A. I told them to fill the tubs up, to keep them well filled.

Q. You told them to fill the tubs up and keep them well filled, did you not?

A. I did.

Q. You have told them that time and time again, have you not?

A. I told them quite often.

Q. And hasn't Mr. Mills told you to tell these stevedores to fill the tubs up and to keep them filled up, and well filled?

A. Mr. Mills has not told me to fill the tubs up and keep them well filled. On the transport dock, Mr. Mills told me to underload the tubs—on the transport dock, not on the Pacific Mail Dock.

Q. Well, did you tell the stevedores, then, of your own volition, and without suggestion from him, to keep the tubs filled, and to keep them well filled?

A. I told them to put coal in the tubs when they went on the scales, plenty of coal" (pp. 924-6).

This witness also testified that under instructions of Mr. Mills, he told the hatch-tenders, "These barges are running a little short, don't let that occur again"; and that the statements made by him to the hatch-tender to keep the tubs filled were made upon occasions when a Government weigher was complaining about unweighed tubs, and would only be made in the presence of the weigher (pp. 929-930).

That these statements were only made for the benefit of the weigher, is likewise shown by the testimony:

“Q. Did it not come into your mind, then, Mr. Powers, when you were asked about keeping the tubs even, which you yourself know means keeping them filled on the scales and off the scales while they are going up there on the side of the vessel, that you had stated to the hatch-tender to fill the tubs and to keep them well filled?

A. I told him in the presence of the weigher to fill the tubs, yes, sir.

Q. And did you tell him in the presence of the weigher to keep them well filled?

A. I may have.

Q. You say you may have?

A. Yes.

Q. If you did tell him that, to fill the tubs and to keep them well filled, it meant, so far as the meaning of the words themselves were concerned, at least, that the tubs should be kept even, did it not?

A. *It was said for effect on the weigher to satisfy him*” (p. 934).

While under cross-examination, he was questioned concerning the statements made by him to the attorneys representing the defendants, upon his visit to their office at the request of Norcross. While he admits stating that the system was partially responsible for the overages, he said:

“I told you that when they went on the scales they were overloaded and when they went up without being weighed they were underloaded” (pp. 939-40).

And again:

“Q. Does it come back into your mind clearly and distinctly that in speaking about that system of weighing, that there was a partial responsibility for the overage, and that you used the word ‘part’ or ‘partial’?”

A. Yes, sir, it does.

Q. Are you able to testify now, with the recollection that has just come to you, positively and unequivocally that that word ‘part’ or ‘partial’ or some word of similar meaning or import was in fact used by you?

A. I am pretty sure it was, otherwise I would be very foolish to give the statement to you that 35 per cent overage was on account of that.

Q. Did you make that statement to me, too?

A. No, I did not make that statement then, I am making the statement now that that percentage would be a very foolish statement to make” (p. 944).

That the witness’ testimony was unquestionably true was demonstrated by a question put to him by Mr. Olney, as follows:

“Q. I will repeat the conversation to you, and then I want an answer, yes or no, from you in regard to it: If I did not open the conversation by saying to you, ‘Mr. Powers, we want to know what the truth is about this matter, is there anything wrong or was there anything wrong down there in connection with the loading of the vessels, or anything you know about down there on the waterfront,’—and did you not say, ‘Yes, there is something wrong’; and did we not then ask you what was it which was wrong, and did you not then reply to us *that the thing which was wrong was that the buckets were heavier loaded when*

they were weighed than when they were not weighed?

A. I stated that that was partly responsible" (pp. 950-1).

That in "meeting the hook" when weights were not being taken, the men were not continuously employed and if desired, could have placed more coal in the tubs, is also shown. Says this witness:

"If these buckets are being hoisted at say 30 an hour, that would be about 2 minutes to each bucket, the men would have practically eight minutes within which to load and bring the bucket of coal forward to the hatchway. It frequently occurs, then, that the two men engaged in loading each tub or bucket complete the labor of loading that tub before it is necessary for them to meet the hook; and it also often occurs that these two men complete their labor, so far as the loading of a particular tub or bucket is concerned, before they are called upon to meet the hook upon occasions other than those upon which the tubs are being weighed" (p. 974).

Robert Sass who, upon occasions, acted as engineer, hatch-tender and shoveler upon the barge, and who, therefore, was in a position to know positively what would occur in the discharge of coal, testified:

"When I worked for the Fuel Company prior to 1904 I observed the way the buckets were being filled from time to time on the barges when coal was being discharged from barges into liners. The tubs that were weighed were always loaded up, filled up, and those that were not weighed were very slight, the majority of them. The coal placed in the tubs that were weighed, as compared with those that were not weighed, was almost always fine or slack coal,

with no lumps in it. The fine coal is heavier than the lump coal. When I was an engineer hoisting on the barges from 1909 to 1910, I again observed the same thing in respect to the tubs."

* * * * *

"Sometimes the tubs that were not weighed would contain as much coal as when weighed on the barges, but not very often" (pp. 1098-9).

Upon cross-examination, the same subject was alluded to.

"Ever since I can remember the buckets were full when they were weighed, and light when they were not weighed. * * * I have seen lump coal in those buckets that would be weighed, but the majority of the coal was fine coal when weights were taken. In other words, when they would weigh the tubs they would generally put in fine coal, and when they would not weigh the tubs, they generally put in fine and lumps mixed" (pp. 1100-1).

Philip Ganesi, also a shoveler on a barge, gave similar evidence, he stating:

"During those four years of my employment, they would always, when weights would be taken, put fine coal in the tubs. It weighs more. The tubs would be often all full of fine coal, the heaviest coal you can find on the barge. So far as the tubs that were not weighed were concerned, they would put in anything that would go, awfully fine or anything. The hatch-tender, above five minutes before a weight was to be taken, would holler, and then we would be keeping watch when the custom-house man came, and we would fill the tub. One time the hatch-tender told me that my tub was pretty light when a weight was to be taken, that there was not enough fine coal put in the tubs and

not enough coal put in and he said to me, 'Why don't you fill them up like the rest'? Four tubs are ordinarily weighed, one at a time, and my tub was the lightest of the four. It was all full of rough coal, rock, and he told me if I did that again he would fire me. The hatch-tender would be all the time telling the men to put more coal in the tubs that would be weighed, or to fill them with fine coal. * * * During my last period of employment, from 1911 to 1913, Mr. Rooker was hatch-tender. Rooker said every time, 'You fill them up pretty good when they are going on the scales, and when they are not going on the scale he don't care'; and the men did fill the tubs well when they were being weighed. The tubs that were being weighed contained more coal than those that were not weighed" (pp. 1106-7-8).

When discharging imported coal overside, the practice would be reversed, that is, the tubs that were weighed would be underfilled, while those that were not weighed would be overfilled. As to this, the same witness testified:

"During these four years, also, I sometimes worked in the hold of a ship that was discharging imported coal, and upon those occasions the coal would sometimes be weighed upon the decks of the ship. They would tell me then, 'Don't you fill too much when they are going on the scales, otherwise the Western Fuel people will get mad if you fill them up too much.' That was in connection with the imported coal" (p. 1107).

Jim Balestra, now a landscape gardener, but who had been both an engineer and shoveler upon the barges, and who had worked under Dave Powers

and Dan Pallas, as hatch-tenders, gave his version of what he observed in the following language:

“As to the method in which we shovelers in the holds of the barges handled the tubs which were weighed and which were not weighed, I would say: When it was time for the United States Government to take the weights we would go to work and put on as much coal as we could possibly put on all of the tubs; and when we did not have to take the weights we would put it on ‘any old way’, we would always leave the tubs not quite full. I never got any direct order to overload tubs from anybody, with the exception of one hatch-tender by the name of Rooker, who would give us a wink at the time when it was time for the custom officer to take a weight, and we knew the balance. Most of the time the custom-house officers used to complain that the tubs were overloaded when weights were to be taken. Some of them, however, did not complain. When a custom-house officer would complain, we, as a rule, would have to take some of the coal off the tub. The way in which we knew that a weight was to be taken was,—the weigher would be standing on one end of the barge, and the hatch would be in the center of the barge, so that when the hatch-tender saw the officer coming he would give us the wink. He did not know positively that a weight would be taken, but he would give us the wink anyway. Sometimes he would say, ‘They are going to take a weight.’ On the ‘Theobold’, the ‘Melrose’ and the ‘Wellington’ the hatch-tender always called up a couple of men to help swing the tub over on the scales. When weights were to be taken we, of course, put fine coal into the tubs if we had any show at all. The reason we did that was because it weighed more. In answer to the question whether anything was said by the hatch-tender or by anybody else upon the subject of putting

more coal into the tubs and of putting fine coal into the tubs when weights were to be taken if we had a chance to do that, I would repeat what I have already said, that we would get a wink from the hatch-tender that they were going to take a weight, and that we knew the balance" (pp. 1119-20).

This witness also testified that when weighing tubs upon the "hanging scales" it frequently occurred that the shovelers would put their foot upon the tail of the tub so as to make the tub weigh heavy.

"The part of the scales indicating the weight would be above the deck. On such occasions we would often step on the rope or tails of the tub if we had a chance to do so, and thereby press on the scales, and consequently make the scales register more weight than they should. We could not do that very often if the custom-house officer were on the lookout, but we did it whenever we had a show" (p. 1120).

That the reverse method was pursued in discharging foreign coal overside, was also testified to (pp. 1121-2).

That the signal from the hatch-tender would be given in advance and sometimes caused them to over-fill tubs that were not weighed, was shown upon the cross-examination of this witness.

"Q. Oh, this wink that you speak of was given a round or two ahead; is that correct?

A. At times, not always.

Q. Not always?

A. No.

Q. When the wink was given to you, when did you understand the weighing was to take place, the next round, or the second round or the third round?

A. Then we would be good and careful to overload every time so that when they did take the weight they would be on the safe side.

Q. Oh, after you got the wink you loaded the tubs to overflowing every time so as to be sure not to get caught; was that it?

A. Exactly" (p. 1132).

Tony Belish, also a shoveler, thus described the practice complained of:

"When the tubs were going on the scales, the practice of the shovelers was to get heavy coal from amidships, if they had the chance and there was no custom-officer around. By amidships coal I mean fine coal. In the wing the coal is rough and light. I would know when a weight was going to be taken because the hatch-tender would holler, 'Give me a tub on the scales.' * * * After the men came up on the deck the shovelers in the hold would stand there and fill up the tubs. They would fill them up good, you know, load them. They would put a little more coal in the tubs when they go on the scales. I have done that myself. The hatch-tender gave me a sign to that effect. He would say, 'This fellow is going on the scale', and would make a sign which everybody knows who has worked down there five or six years. There would be about 100 pounds difference in the tubs which were weighed and those which were not weighed" (p. 1137).

This testimony was amplified upon cross-examination, where the witness testified:

"I have said the difference between the weight of the tubs that were weighed and those that were not weighed on the barges was 100 pounds. I know, because I was on the deck and put the tubs on the scales, and when they had rough coal it weighed about 1800 or 1900

pounds, and when they had fine coal it weighed about 2100 or 2150 pounds.

Q. But when the tubs were to be weighed and it was known they were to be weighed, they were always filled with fine coal, which you say was the heaviest coal?

A. Yes, fine coal is heavy coal.

Q. And those tubs which were to be weighed did not have any lump coal in them at all?

A. Sure, they get some lumps, but they get between the lumps, fine stuff, pretty fine stuff, and pretty much of the fine stuff.

Q. When you say there was no custom-officer around, you got the heavy coal?

A. Sure" (p. 1139).

Upon three or four occasions between 1906 and 1909 J. T. F. Burns, while temporarily relieving an assistant weigher, observed that the buckets that were weighed were fuller than those that were not weighed, and noticed that after a signal would be blown in a certain way, it would be followed by a bucket that would be loaded heavier than any of the others (p. 1155). During this same period of time and until October 1, 1910, upon a number of occasions he would be upon the decks of the liners for fifteen or twenty minutes at a time. In describing what he noticed regarding the condition of the tubs, he stated:

"My observation of the weighing was that they would take along about every fourteenth or fifteenth tub, and when they came up out of the hold of the barge, the coal would be all falling off of it, and the other times you could not see where the coal was in the bucket; once in a while you could see a big lump sticking out of the tub, and none on the side. I noticed on

one occasion, I saw a weigher having trouble with the men shoveling coal into the tubs, and he weighed ten tubs. After he took the first three weights, I noticed that the other seven buckets were fuller than the first three tubs.

Q. To what extent?

A. To the extent that they came up out of the hold with the coal falling off of them."

* * * * *

"Q. Upon those occasions, ordinarily, and without referring to any specific occasions, what did you observe regarding the quantity of coal that would be contained in the tubs that were weighed?

A. Well, the exact weight, I could not tell.

Q. I do not mean so far as the pounds or tons are concerned, but I mean as to what you observed regarding the quantity of coal in the tubs, how was the coal located upon the tubs?

A. Well, it always, at any rate it rather looked heaped up on the center, and that is the reason I always had the idea it rolled off the center of the tub.

Q. What would you ordinarily observe regarding the quantity of coal contained in these tubs which were not weighed?

A. Well, sometimes you could see the coal in the tub, and sometimes you could not" (pp. 1156-1158).

A. H. Freund, formerly an assistant weigher, voiced his experience upon this subject in the following manner:

"I have frequently weighed draw-back coal. I think it was from 1904 or 1905 until the time when they took off the duty. Such coal would be weighed from the barges. I have worked often on the barges in the daytime and sometimes at night time.

* * * * *

Q. I want you to go on and state to the jury what you have observed from time to time while you have acted as assistant weigher upon those barges weighing draw-back coal, so far as the filling of the tubs is concerned.

A. Well, I can state that it has been the usual thing to always have trouble; the coal shovelers if they knew you were going to weigh would load the coal up to the hatch, right up as high as they could on the tubs; I would holler down the hatch to Mr. Parks—he was always clerking as a rule with us—he would kick about it and then I would go over the hatch and tell them that if they didn't quit it we would make them. I have also spoke to the hatch-tender and he has told them also. I have had tubs come up that were loaded so that when they came out of the hatch, or when I came to the hatch—we had orders not to stand over the hatch; our orders from the chief weigher were to stand clear of the hatch and take the tubs at random, but when they knew I would weigh I have seen them throw on 3 or 4 or 5 shovels of coal to fill it up and I would let it go by, I would not weigh it" (pp. 1176-1177).

* * * * *

Q. Upon occasions when you would notify the hatch-tender that you wanted to weigh a round of tubs and a round of tubs would be weighed by you, what, if anything, did you observe the shovelers down in the hold of the barge doing with reference to the quantity of coal which would be contained in the tubs which you would be called upon to weigh?

A. Well, on a few occasions I have caught them heaping the tubs and I would refuse to weigh them. As a rule I have called them down pretty hard and threatened them that I would ring up Mr. Mills or somebody and get a gang of men who would do as they were told; as a rule they gave me pretty good weight.

Q. Did you ever compel them to remove coal from the tubs?

A. Yes, sir'' (pp. 1180-1181).

This witness also stated that it frequently occurred that when he came to weigh tubs he found that they contained so much coal that he refused to weigh them, and would let them go up to be dumped without weighing (pp. 1181-1182). It also appears that upon one occasion he weighed a barge short. As the result of this situation, he failed to get another assignment on the Mail dock for some months (pp. 1182-1183).

MILLS KNEW AND ACQUIESCED IN PRACTICE.

That this practice was not only known to Mills, but its continuance was insisted upon and encouraged by him, is likewise made manifest. Says the witness Edward Powers:

“When I spoke to defendant Mills about the matter (talking about complaints of shortages from engineers), he would tell me that the United States custom men were weighing the coal. He gave me the same excuse that I was giving the other men, and it was a true excuse. The custom weighers were weighing the coal. In answer to the question whether the defendant Mills ever suggested to me the propriety of telling the men in the hold that they ought not to put any more coal in the tubs that were weighed than in the tubs that were not weighed, I would say that Mr. Mills told me that the chief engineers were always growling,—that it was part of their job to growl. He asked me if I had any trouble with the weighers, and I said no, that they were weighing the coal, and

that they were not kicking. Mr. Mills told me not to have any trouble over there. I have no distinct recollection of his telling me to suggest to the men in the hold that they should not put any more coal into the tubs that were weighed than in the tubs that were not weighed, but he may have told me that—I don't remember, that is a long time ago; he may have told me that, I have forgotten" (p. 870).

It appears that upon some few occasions the barges ran short, about one per cent of the barge discharges. That these shortages did not meet with Mills' approval, is also shown by the evidence of this witness. Upon this subject he testified:

"Q. Did the defendant Mills ever discuss with you the cause for the difference in weights that were checked in as compared with the weights that were checked out?

A. He did not.

Q. He did not?

A. No, except when he ran short he made a howl, that is all.

Q. How frequently, how often did the barge run short?

A. Two or three times, to my knowledge, a couple of times—two or three times."

* * * * *

"Q. Did he make any complaint about it running short?

A. I don't remember whether he did or not.

Q. What do you mean by 'howl'?

A. Well, 'The barge is running short; what is the matter.' That is all."

* * * * *

"Q. Are you prepared, are you in a position to testify distinctly or clearly that he did not say anything else?

A. No, I am not; I don't remember" (pp. 874-5-6).

The evidence quoted was given upon direct examination. The equivocal answers made by the witness, and the necessity for further questioning to develop the facts within his knowledge, clearly manifest the antipathy of the witness to the Government, and his friendly mental attitude towards defendants.

The desire of Mills not to have trouble with the weighers was not an insistence on his part that the tubs be kept filled. It was his purpose, so far as possible, without deviating from the method thoroughly understood by the men, to avoid undue friction with the Government weighers who might insist on the proper weighing of the coal.

It seems that upon a number of occasions, complaints were made by assistant weighers against the practice indulged in, of overloading tubs that were weighed, and underloading tubs that were not weighed. In fact, upon a number of occasions, the situation became so acute that coal had to be taken out of the tubs before some of the weighers would permit them to go on the scales.

Many of these complaints were directed against particular hatch-tenders, and were repeatedly made (pp. 909-910). If the Western Fuel Company, or if Mills had been either anxious or desirous to terminate this practice, but little difficulty would have been encountered by it, or him. A command from the defendant Mills, or the defendant Smith, that the tubs be kept even, and that unless kept even, or if complaints of the character mentioned

were again made, the hatch-tender would be discharged, would have been immediately effective. To accomplish such purpose, however, was not the desire or intention of either Mills or Smith. This is conclusively shown by the evidence of Edward Powers (pp. 908; 910). All that Mr. Mills could be persuaded to say was not to have trouble with the customs weighers.

“Q. When he would talk to you about not having any trouble over there, referring to trouble on the mail dock, was he not talking about the keeping of the tubs even, if that is the expression that is used?

A. Well, a complaint came in about one of the hatch-tenders. That is the reason it was said.

Q. A complaint came in about one of the hatch-tenders?

A. Overloading the tubs, yes, sir.

Q. Do you recall from whom that complaint came in?

A. It came to me from several customs weighers.

Q. It came to you from several customs weighers?

A. At several different times.

Q. And you reported that complaint to Mr. Mills, did you not?

A. I did.

Q. And it was in connection with that, that Mr. Mills stated to you that he did not want to have any trouble over there, was it not?

A. It was” (pp. 908-9).

Powers, following the trail blazed out by Mills, would make the same character of statements to hatch-tenders, notwithstanding repeated complaints, for instance:

“Q. Do you remember at this time the name of the hatch-tender about whom the customs-house weighers had complained to you?

A. Yes, Dan Pallas.

Q. He was one of the hatch-tenders that was working for the company at that time?

A. He was.

Q. And what, if anything, did you say to the customs weighers at the time that they complained to you about Pallas?

A. Oh, I passed it off. I didn't say much to him.

Q. Did you have any conversation with Pallas?

A. Well, I told Pallas not to have any trouble with the weighers.

Q. *Did you not tell Pallas, Mr. Powers, to try to keep the tubs even?*

A. *The remark I made to Pallas was to have no trouble with the customs weighers*” (pp. 909-911).

And, although subsequent complaints continued to be made against Pallas (pp. 910-11), his retention by the company is convincing proof that he was considered an efficient and capable employee, watchful of its interests.

STEAMSHIP “ALGOA”.

At pages 94-95 of this brief we have pointed out how upon the discharge into barges of the cargo stored in the steamship “Algoa,” without considering the coal placed in her bunkers it weighed 116 tons 784 lbs. in excess of the customs-house weight at the time it was discharged from the importing steamer and loaded into the “Algoa.”

Upon being discharged from the "Algoa" the coal was checked into barges, which from time to time received coal from other sources, and with this additional coal subsequently found its way to the bunkers of vessels. All these barges, with the exception of one, turned out over. The exception resulted in a shortage of 34 lbs. (a fraction of a sack of coal). The total overages of these barges amounted to 351 tons 2006 lbs.

A table covering all of these transactions will be found at pages 1211-1215 of the record.

The operations resulting in the discharge of the coal from the "Algoa" were supervised by Edward Powers, and according to his testimony the coal was correctly weighed (p. 893).

**DEFENDANTS' FAILURE TO PRODUCE WITNESSES HAVING
KNOWLEDGE OF FACTS.**

It is a familiar rule of evidence that testimony is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and that therefore, if weaker and less satisfactory evidence is offered when it appears that the party had the ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

C. C. P., Sec. 2061, Subdivisions 6 and 7.

This rule has become so thoroughly established that it is part of the statutory law of almost all of

the states whose laws have become codified. That it is a most salutary rule and one grounded in common sense and based upon human experience, must be conceded; that it has application to the case in hand is unquestioned.

It appears without conflict in the evidence that for long periods of time the Western Fuel Company had many men employed upon its barges and in the holds of the discharging vessels, consisting of shovelers, engineers, hatch-tenders and barge-tenders. If, as claimed by the Government, tubs were wrongfully overloaded when weighed and underfilled when not weighed, such practices were known, not alone to the hatch-tenders, but likewise to the shovelers, the engineers and the barge-tenders. These men, above and beyond all others, were in a position to positively establish the truth or falsity of the charges laid in the indictment. Out of the hatch-tenders two alone were produced, Andrew Rocca and Frank Wilson. Dan Pallas, to whom trouble with the weighers had been imputed by direct evidence, although an employee of the Western Fuel Company, was not put upon the stand. Not a single shoveler, nor engineer, nor barge-tender was called upon to attest the innocence of the defendants. With the exception of the testimony of the defendant E. J. Smith, limited to a few details, no tally clerk, shipper's clerk or customs weigher was called to contradict the claims of the Government. Although cross-examined at great length and with an exaggeration of detail,

not a single witness attempted to impeach or contradict the testimony of Tidwell. Not a solitary engineer on any of the vessels coaled by the Western Fuel Company was sworn to corroborate the claims of the defendants that the weight of the coal discharged into the bunkers of these vessels was consistent with the weights entered in Mills' books, charged against the various companies, and upon which weights payment was received.

Many, if not all, of these witnesses were available. None were produced. No showing was made that they could not be produced. Why they were not forthcoming, and why the defendants were content to rest their case without the benefit of their evidence, is obvious. The inquiry answers itself. The rule invoked would condemn, at least as suspicious and distrustful, the weaker evidence offered.

The applicability of this principle of jurisprudence is emphasized when we take into consideration the fact that much wealth must have been distributed in procuring the attendance from distant climes of many high-priced experts to deliver eloquent dissertations on the many abilities of the coal to increase in weight—evidence that not only lacked merit, but in many of its details was flatly contradicted and disproved—while almost at the threshold of the courtroom were located witnesses who, if the defense were founded upon truth, could have attested its verity and persuaded a verdict of acquittal.

EXPERT EVIDENCE.

We might appropriately apologize for alluding, even in a limited degree, to the testimony given by the experts called on behalf of the defendants. We preface our remarks upon this subject with this statement because we realize that, however effective expert evidence may be, it is not binding or conclusive in any case. It can not weigh with the jury as against direct and positive evidence showing the facts to be otherwise than as the experts believe they should be. In fact, the jury with propriety and acting within their province, may disregard the expert evidence, even where it is uncontradicted, and base their verdict upon their own judgment. However persuasive this character of evidence may appear, even in a case unlike the one at bar, where the facts against which the expert evidence is leveled have been established by direct and positive proof, it is without force in an appellate tribunal, searching the record to ascertain whether the evidence introduced in the court below is sufficient to sustain the jury's verdict. Counsel for plaintiffs in error recognized the futility of discussing at length this phase of the defense. They referred to it, however, in support of some of their conclusions. It is for this reason that in the full performance of our duty to the Government we feel justified in briefly touching upon it, because in no aspect of the case, even if believed, does it meet the situation disclosed by the Government's testimony. In addition to this, however, Professor

Branner, president of the Stanford University and a well-recognized authority on coal, also called by the defendants, absolutely devitalizes the evidence given by the other experts. But, above and beyond all of this, the effect of this expert evidence was swept away by the testimony of Brown, in charge of the United States coaling station in California, whose actual experience established lack of foundation in their claim.

According to the experts, there are two main causes for changes in the weight of coal, one being moisture content and the other oxidation (p. 1574). Some coals are known as high moisture coals, that is, coals naturally containing considerable moisture. The Wellington, British Columbia and Australian coals, however, are all bituminous coals, of the low moisture class, having a moisture content at the time they are broken from the seam in the mine, of 3 or $3\frac{1}{2}\%$ (pp. 1602-3). Oxidation is due to the oxygen of the air and the moisture combined, coming in contact with the carbonaceous matter and the sulphur in the coal (p. 1612). This oxidation, according to the testimony of some of the experts, proportionately increases the weight of the coal.

According to the witness Parr, the coal handled by the Western Fuel Company between 1906 and 1912 by reason of added moisture and oxidation might increase in weight between 2 and 4 or $4\frac{1}{2}\%$ (pp. 1622-3). To this he subsequently adds $1\frac{1}{2}\%$ for water placed on the coal to lay the dust, thereby increasing this general percentage from $3\frac{1}{2}\%$ for the

minimum to $5\frac{1}{2}\%$ or 6% as a maximum, so far as the barges are concerned (p. 1625). This is finally reduced again by him from $2\frac{1}{2}$ to $4\frac{1}{2}$ or 5% . (p. 1626).

The cross-examination of Parr completely destroyed the effect of his testimony on direct. After testifying that within fifteen days, in the climate of San Francisco, by oxidation alone coal might increase in weight $\frac{1}{2}$ of 1% (p. 1662), and later as much as $1\frac{1}{2}\%$ (pp. 1622-3), he then gives the same figures for a period of sixty days (p. 1666). He admits that it would be impossible to ascribe any natural or scientific cause to the increase shown by some of the barge overages (pp. 1669-70). He then states that although heat increases oxidation and makes its progress more rapid, a cargo in transit from Australia to California would not gain or increase in weight, because the loss of moisture would offset the oxidation (pp. 1672-3). Admitting that there would be very little evaporation on the trip from Nanaimo to San Francisco with the hatches closed, he nevertheless would not state that there would be an increase of weight due to oxidation (p. 1674), but believed that it might be possible (pp. 1677-8). He was finally persuaded to testify that in any event the loss in weight of a cargo in transit between Nanaimo and San Francisco would not be more than $\frac{1}{4}$ of 1% (p. 1681).

And although the witness understood that he had been employed to testify to an increase in the weight of coal during a given period, he failed to make any

report to the defendants on the result of oxidation (pp. 1694-5). Notwithstanding all of this evidence thus given by him, including the increase in weight through the handling of coal by the Western Fuel Company, and the experiments conducted by him, and the alleged increase in weight due to oxidation and moisture content, a bulletin written and published by him in his professional capacity for scientific purposes and for the instruction of students (pp. 1702; 1729-32), entitled "Weathering of Coal," was called to his attention.

Among other things, this bulletin set forth experiments conducted by Parr by leaving coal in an open box on a roof in Illinois from December 15, 1908 until June 17, 1909, exposed to rain, snow and storms resulting in each instance in a *decrease* and *loss* of weight (pp. 1699-1704). In another case cited by the witness in his bulletin, in 124 days, instead of there being an increase in weight resulting from oxidation, there was a decrease of 0.33 of 1% (p. 1718).

Relating to the tables above cited, the witness testified:

"Q. Were not the opportunities for oxidation in this given case appearing on page 3 greater than the opportunities for oxidation of the coal in the bunkers of the Western Fuel Company?

A. I cannot say as to that" (p. 1723).

In another part of the same bulletin the witness cited the case of W. A. Powers, chief chemist of the Santa Fe Railway Company, who made tests

exposing 100 lb. lots of coal to the elements for seven months, showing in each instance loss of weight (pp. 1728-1730).

On redirect examination the witness attempted to give some explanation of the tables above referred to, but this explanation was again shattered upon recross, when the witness testified:

“Q. What does this 1.54 mean? Will you explain it, please—minus 1.54?

A. It means that there was a seeming decrease in the mass of coal.

Q. A seeming decrease in the mass of coal which was free from moisture?

A. Which was free from moisture.

Q. Which was free from moisture when it was first weighed, and which was free from moisture when it was last weighed?

A. That is true.

Q. Now, during that period of 6 months, did the coal oxidize?

A. It did.

Q. Notwithstanding the oxidation, there is a seeming decrease in the weight of the coal, equivalent to 1.54 per cent?

A. There is.

Q. After all the moisture had been deducted?

A. There is” (pp. 1767-8).

The testimony of Prof. E. E. Somermeier, another expert called by the defendants, although possessing some similarity to the evidence of the preceding witness, was not as strong or as vigorous. In his judgment the coal in transit from Nanaimo to San Francisco might diminish, but if so, to a very slight extent (p. 1785). According to this witness,

oxidation did not take place as rapidly as indicated by Prof. Parr, he stating that Australian coal remaining in pile for *two months* might oxidize perhaps $\frac{1}{2}$ of 1% (pp. 1793-4). The judgment of this witness was that the increase in weight in the coal handled by the Western Fuel Company between 1906 and 1912 would be from 2 to 4% from natural causes, with possibly $1\frac{1}{2}\%$ added if the barges were wet down for six months of each year when no rain fell (p. 1798).

Notwithstanding the giving of this evidence, it appeared on the cross-examination of this witness: that while at Nanaimo he had taken a sample of coal from a car, the contents of which had been exposed for six weeks, and upon which a half inch of rain had fallen, and yet it had increased in weight only 19/100 of 1 per cent. That this situation was inconsistent with the testimony of the witness, is shown by his own inability to explain.

“Q. I will direct your attention to these figures here; you say that the sample taken from the mine showed a moisture content according to the Pittsburg method of 2.97; the sample taken from the open car showed a moisture content of 3.16, after six weeks’ exposure on the car, a difference of .19 of one per cent. Now, there is a difference of .19 of one per cent between the moisture content of the coal taken from the mine and the moisture content of the coal taken from the open car which had been exposed to the rain and the elements for six weeks, and upon which $\frac{1}{2}$ an inch of rain fell; there is only a difference of .19 per cent. How do you explain that according to the theory you have announced here?

A. The sun was shining on the car most of the time during that six weeks.

Q. The same sun shines in San Francisco as shines up there, does it not?

A. Certainly.

Q. And the moisture permeates through the mass of coal according to the duration of exposure to the rain, does it not?

A. Certainly.

Q. And the moisture permeates through the mass of coal according to the duration of exposure to the rain, does it not?

A. It is according to the amount of rainfall, yes" (p. 1811).

This witness again contradicts Parr by stating that in his judgment coal contained in a shed for six weeks, having plenty of ventilation, might increase in weight from 3/10 to 5/10 per cent by oxidation (p. 1834).

A preliminary report made by this witness to defendants' counsel is strongly in discord with his testimony. It is there stated that, on the assumption that the coal is held in storage for an average period of three to four months, the amount of rainfall at San Francisco, 22 inches, is sufficient to increase the moisture in the coal 3 or 4%, the assumption being based upon the idea that the average storage period means that fifty to seventy-five thousand tons of coal were kept on hand (p. 1844). He further states that

"The oxidation of coal in the time held in storage here is probably less than three-tenths of a per cent, which would correspond to less than three-tenths per cent increase in weight due to this cause"(p. 1845).

The report on this subject then concludes:

“With this low moisture coal, and with the humidity and rainfall of San Francisco, the changes in weight are practically all increases. The increase due to rainfall may well be as high as three per cent, that due to oxidation of the coal itself up to three-tenths per cent, and that due to oxidation of sulphur to sulphate from three-tenths to one and two-tenths per cent, and that the total result is over three per cent is not at all surprising” (p. 1846).

David M. Folsom had been a professor of geology and mining at Stanford University for about three years. He testified to a number of tests and experiments conducted by him for the purpose of ascertaining increase in the weight of coal due to moisture and content and oxidation. He illustrated and elaborated his testimony with many picturesque charts, the value of which from an artistic standpoint cannot be minimized. In conducting the experiments he testified to soaking the coal, weighing it, and then soaking it again, and according to his evidence, each soaking added vigor to the theories which he was attempting to expound. When the direct examination closed, every one in the courtroom marveled at his learning and many were almost persuaded that his judgment was infallible. It was with considerable surprise that it was finally developed upon cross-examination that he was without experience in coal and that, while he felt that he was competent to make the tests that Mr. McCutchen wanted, when he came to see him he told him, using his language, that

“All I knew about coal was that it was black and that it would burn, under certain conditions” (p. 1906).

After this witness had left Stanford University he went to work in the copper mines in Montana, having had no experience in coal up to that time. While there, he was engaged at the smelter for five years and three months. Four hundred tons of coal a day were brought there for fuel purposes. They had kept four thousand tons in the yards in storage at a time. A tally was kept showing the amount of coal that went into these piles and the amount of coal that went out, and on the first of every month the witness had to estimate the amount of coal in the pile, for the purpose of striking a balance and checking the weights of the smelter foreman. Regardless of these facts, he found it impossible to testify whether a pile containing a given number of tons ever showed an increase in weight when it became exhausted (pp. 1901-2). After leaving that employment he took up teaching at Stanford, and admitted that he had never been in a coal mine and that his only experience in connection with the Montana company was in the matter of ordering supplies of coal and measuring the stock (p. 1902). As bearing upon his lack of experience, he testified:

“I have never made an analysis of coal for the purpose of determining the amount or increase in the weight of coal by reason of oxidation or for the purpose of determining the moisture content of the coal, or for ascertaining

the change in the weight of coal from any cause, —except, of course, in the tests that I have described here in court.

“I never in all my life previously made such analyses as those on the tables which have been shown here, which tend to show a certain reduction in the moisture content in coal, and a certain increase in weight by reason of the oxidation of the sulphur in coal and a certain increase in weight by reason of the oxidation of the substance of the coal” (pp. 1003-4).

It later developed that, with the exception of putting some letters on tables 1 and 3, he had had nothing at all to do with the making of the charts, testifying that if Mr. Pyle, by whom they were made, had not taken sick on the job, he personally would not have touched them (pp. 1905-6), and that, as a matter of fact, a Mr. Bohart had made the analyses and had looked after the actual work done on the tabulation relating to tests of oxygen (p. 1906).

The effect of the testimony of this witness and of his numerous charts was finally completely extinguished when, over the objection of the defendants, it was ascertained that between July 21 and August 21 he had experimented with different kinds of coal, by subjecting them to the atmospheric influences, showing in each instance an ultimate loss, instead of increase, in weight. His testimony upon this subject follows:

“Q. Did any rain fall during the time this coal was subjected to the atmospheric influences?

A. A little rainfall, .09 of an inch.

Q. What did you ascertain when you made that experiment, as to the loss or gain of that coal which you experimented with to show the result of the atmospheric conditions for one month?

A. I found that immediately after the rain, a day after the rainfall, the rain fell for two or three nights in small showers, between July 21 and the 25th; on the 26th of July, and on the 25th of July the coal showed a gain in weight, various samples, it ranged between .093 per cent gain up to .3 of a per cent gain. This coal was exposed until August 21st, and most of the samples had lost its moisture.

Q. Now, as a matter of fact, during this one month's exposure, and notwithstanding the downfall of rain, all of this coal diminished in weight, did it not, according to your own report?

A. Yes, sir; but that is not a fair test—
* * * because the wind was blowing quite strongly down there during the month of August, and it blew out a good deal of dust in the pans, and I didn't pay much attention to that test, except that it indicated that coal was susceptible to change in weight.

Q. Is is not the same kind of wind that blows down there that blows over the Folsom Street bunkers up here?

A. Yes, sir" (pp. 1911-1912).

COMPLETE COLLAPSE OF DEFENDANTS' THEORY.

In laying the foundation for expert evidence, D. C. Norcross, when called as a witness for the defendants, stated:

"The average amount of coal on hand and on storage during this period (April 1, 1906 to December 31, 1912) on the first day of each

month is 32,085 tons. The coal is stored partly in San Francisco and partly in Oakland. The Western Fuel Company has covered storage space affording protection from the rain for about 10,000 tons of coal, 6,000 in Oakland and 4,000 in the Folsom Street bunkers, but we only use about half the Oakland space for imported coal, and, for the last two years half of the Folsom Street space has had the roof off" (p. 1619).

He further testified that—

"The average amount of coal received per month would be very close to the scales, because there would only be a few thousand tons on hand at the end of the period, and it would average up about the same. The yard coal is apt to remain with us longer than the bunker coal. We always go to the bunkers first and leave the yard pile untouched except when the bunkers are exhausted.

We do keep coal in the yard for say more than 30 or 60 days at a time. How long we keep it depends as a matter of fact upon the amount of coal in the bunkers. The coal is moving in and out a good deal from the Oakland bunkers as also from the San Francisco bunkers. The coal is also continually moving out of the yard in San Francisco, but it moves more frequently when there is no coal in the bunkers. Large quantities of coal are constantly coming in and going out and that is particularly true with reference to the bunkers, which are merely temporary storehouses" (pp. 1619-1620).

It thus appears that the coal located in the bunkers, from which the barges take their cargoes, is kept moving practically all the time, and that the large majority of coal that is kept in storage is con-

tained in piles located in the yards of the Western Fuel Company, a department over which the defendant Mills had no jurisdiction and with which we are but indirectly concerned.

One of the leading experts called by defendants was Professor J. C. Branner, President of Stanford University, whose direct examination disclosed considerable knowledge of coal. His testimony effectually disposed of the oxidation theory as applied to the facts in this case, and proved that in the handling of the bunker coal, between the moment of its initial discharge at this port, and its delivery into the bunkers of the vessels, but little weight would be taken on as the result of increased moisture content. We quote his evidence:

“Q. Assume that a load of that coal comes here to San Francisco, in dry weather, and is exposed for, say, ten, twenty, or thirty days, in the absence of any rain, and assume that the moisture percentage varies from 2.53 to 4.44, would not that coal lose weight by reason of the exposure to the atmosphere?

A. I don't think so.

Q. In dry weather?

A. I don't think so. Excuse me, I mean if that moisture content that you refer to there is the moisture content as stated in an analysis, that moisture would not be lost.

Q. That moisture, itself, would not be lost?

A. No.

Q. But would the coal take on any additional moisture if it did not rain?

A. I should not think so.

Q. You should not think so?

A. No.

Q. You would think that in dry weather, in the absence of rain, the moisture content would not be altered at all?

A. I should not expect it to.

Q. Now assume a case of this kind, Doctor, a cargo of 3,000 or 4,000 tons of this coal is brought from Nanaimo to San Francisco, in dry weather, in the summer-time, when the ordinary summer winds prevail, and there is no rainfall, and assume that when the coal comes here it is discharged into bunkers of the dealer in coal, and is during the prevalence of dry weather, within a very few days, transferred from the bunkers into barges, and within a few days, say ten days, is transferred from barges into ships, for fuel purposes, no rain, mind you, in the meantime falling at all, in your opinion would that coal be affected in weight?

A. I should not think so.

Q. In other words, you would think that the coal, when placed in the ship from the barge, would be equivalent in weight to the weight of the coal when transferred from the mine into the ship.

A. I should think so" (pp. 1818-1820).

After testifying that if such a cargo of coal contained about 25 per cent of fines, (screenings) in the winter time, considering the weather in San Francisco, it would increase decidedly more than $\frac{1}{2}$ of 1 per cent, he further stated:

"Q. And if, in the meantime, during the period of 30 days, there was, say, for half the time the sun shining brightly and no rain falling, would you not consider that the effect of the sun and the atmosphere on the coal would tend, in a great measure, to remove a great deal of the moisture?

A. It would remove the moisture decidedly, yes" (pp. 1820-1).

In connection with this evidence the court will remember that the overages disclosed by Mills' books were just as great, and sometimes greater in the summer time than they were in the winter.

That a cargo of coal, while being transported from Nanaimo to San Francisco would neither decrease nor increase in weight, is also shown.

“Q. Now, assume that a cargo of coal was placed upon a ship at Nanaimo and transported to San Francisco and the coal is four days in transit to this port, and assume that the hatches of the vessel are closed in transit, in your opinion would there be any appreciable diminution of the weight of that coal during that period of time?

A. I should not think so.

Q. And, in your opinion, would there be any appreciable increase in the weight of that coal during that period of time?

A. Not if it is kept dry.

Q. The oxidation during that period of time would be practically nil, would it not?

A. It would amount to but very little, indeed.

Q. It would be negligible, would it not?

A. I think so” (pp. 1822-3).

And that the increased weight by oxidation within a period of a few months would be too infinitesimal to be observed, was also testified to:

“Q. Suppose that character of coal came here to San Francisco and was transferred from a ship to a bunker and from the bunker to a barge, and from the barge to another ship, for fuel purposes, in dry weather, the entire period of time from the date of shipment to the date of discharge into the liner being about

30 days, the oxidation during that period of time would be practically nil, would it not?

A. I should think so.

Q. It would amount to nothing; and assume, Doctor, that a pile of coal containing 32,000 tons were exposed to atmospheric influences for about 60 or 90 days, in dry weather in San Francisco, here, wouldn't the oxidation of that coal be practically nil?

A. I think that would be a negligible quantity.

Q. By that you mean practically nothing, do you not, Doctor?

A. I do, yes.

Q. There would be practically no change in the weight by reason of oxidation of the coal?

A. You appeal to me there as a geologist, and when we deal with periods there, there is some difficulty in understanding each other. I should say practically that the oxidation of coal, while we know that it goes on to a very considerable extent, it takes such long periods of time for it to oxidize, I should think that in commercial transactions, it is a negligible quantity."

* * * * *

"Q. Assume, Doctor, that in this coal, there, the sulphur in the coal varies in extent from a fraction of .1 per cent to 1.27 per cent, would not that amount of sulphur in the coal be of such a slight quantity that the oxidation would be practically nil for any period of time?

A. Well, I should not say for any period of time.

Q. Well, say for that month?

A. I don't think it would be of any particular importance.

Q. Or for 6 months; don't you think the oxidation for a period of 6 months would be practically nil?

A. It would be very little" (pp. 1824-5).

And again:

“Q. Now, assume, Doctor, that the pile of coal referred to in Mr. Olney’s question was not constant, but was being moved, changed every thirty or sixty days, wouldn’t the amount of oxidation in that pile of coal be also nil?

A. I think so.”

* * * * *

“Q. Is it not a fact, also, Doctor, that if this pile of coal were kept moving completely every thirty or sixty days, in ordinary winter weather, like we have here in San Francisco, would not the increase by the oxidation in that pile of coal be practically nil?

A. I think so.

Q. And don’t you think, also, Doctor, that the increase in weight by reason of moisture in this pile would be comparatively slight, where it is kept moving and completely moved in 30 or 60 days?

A. Of course, if the coal were handled, shoveled, or anything of that kind, so that the atmosphere could get at it, the moisture would soon disappear out of it” (p. 1827).

Nor can any comfort be derived by defendants from his redirect examination, for there he states:

“Q. Doctor, is the process of oxidation always a process by which the weight is increased, provided it does not reach the point of ignition; take it at normal temperatures?

A. No, oxidation does not always increase the weight of coal” (p. 1831).

And again, on recross examination:

“Q. Didn’t you always, in dealing with the question of the change in the condition of coal, consider the effect of oxidation, as affecting the weight of the coal, as practically of no importance?

A. That is the way I looked at it.

Q. As always being a mere negligible quantity to be considered?

A. Yes" (pp. 1832-3).

To demonstrate how unreliable were the conclusions of Professors Parr, Somermeier and Folsom, the Government produced in rebuttal, George W. Brown. This witness was connected with the naval coaling station at Tiburon. Between May or June, 1908, and the year 1911, the Government stored in one pile, at this station, approximately 83,000 tons of coal, *80 per cent of which represented fines* (p. 2231). If any faith is to be placed in the testimony of these experts, this was certainly a pile of coal, considering the percentage of fines, that presented an ideal condition for increase of weight from moisture content and oxidation. Describing the pile, this witness said:

"The pile was surrounded by a bulkhead 100 feet wide and 640 feet long, on top of which was a bunker occupying the middle 30 feet of the length. *The bunker was not covered and the coal was exposed to the weather*" (p. 2232).

The whole of this coal, with the exception of 740 tons, according to the intake weight, was discharged in the month of April, 1911. The overage resulting from this pile was between 200 to 400 tons (p. 2232) speaking in percentages between $\frac{1}{4}$ and $\frac{1}{2}$ of 1 per cent. That the weights taken were accurate is shown by the fact that at the time of its original discharge, as well as when checked out, the coal was weighed on an even beam (p. 2231).

In concluding our comments upon the expert testimony, we desire to invite the court's attention to two very significant circumstances:

(a) The principal claim of the experts was that the increase in weight of the coal was due to moisture content. Professors Parr and Somermeier had procured samples from the mine when the coal was broken from the seam and had ascertained its then moisture content. The assistant to Professor Folsom had likewise ascertained the moisture content of some of this coal after it had arrived in San Francisco. If, between the date of its arrival here and its final discharge into the steamers coaled, the commodity had increased in weight by moisture content, it is obvious that its exact increase from this source could have been demonstrated by taking a sample of coal from the barge at the time of delivery, or from the bunkers of one of the liners, and ascertaining what its moisture content was. The difference between its moisture content at the mine and its moisture content at point of ultimate delivery would represent the difference in weight (p. 1606). If several of such tests had been made, the claim made could have been established or disproved.

(b) The total overage
resulting from all of
the foreign coal
handled by the West-
ern Fuel Company be-
tween April 1, 1906
and January 1, 1913,

was.....61996 tons 1374 lbs.

The overage representing the branch of the business under the supervision of Mills, which included the offshore bunkers and the barges, was33223 tons 542 lbs.

The exact overage appertaining to all of the foreign coals handled by the Western Fuel Company, outside of the offshore bunkers and barges, was.....28773 “ 833 “

During the period mentioned, the Western Fuel Company received and handled foreign coal, according to out-turn weight, to the amount of.....2138831 “ 473 “

The proportion of this coal handled by Mills' department was.....595492 “ 102 “

The difference between these figures is.....1543339 “ 371 “

which represents the total amount of foreign coal handled by the other departments of the Western Fuel Company, in which the overage was 28,773 tons 833 lbs., or 1.8%.

For the purpose of convenience, this calculation is based upon the out-turn or ascertained weights of the imported coal. If the bill of lading weights had been used, the result would have been proportionately the same.

According to the testimony of Norcross above cited, the coal in the bunkers and on the barges was practically always on the move. It was in the yards that the coal was permitted to accumulate in piles, resort being had to this coal only when the bunkers were getting low. If the expert evidence were to be relied on a much greater overage should have been found in that branch of the business with which Mills was not connected, and in which the yards were included, than upon the bunkers and the barges.

TESTIMONY OF OTHER COAL DEALERS.

On behalf of the defense, several witnesses were called, some of whom had been, and others of whom were still in the coal business, for the purpose of testifying to the existence of overage in the handling of coal.

According to Henry Rosenfeld—

“The coal that is thus in constant movement from ships to bunkers, and from bunkers to barges, etc., does not suffer very much by reason of humidity, and it is not as likely to increase in weight as the coal in storage in the yards up into the winter.”

This coal, said the witness

“is likely to undergo some increase in weight, but I could not say what the percentage of that increase would be. I should judge somewhere between 1 and 2 per cent” (p. 1952).

The witness, H. C. Richards testified that piles of 20,000, 30,000 or 40,000 tons would increase in weight when stored in a yard and subjected to water. He refused, however, to state what the percentage of overage would be (p. 1956). His cross-examination, however, disclosed what his views upon this subject were:

“Q. But where the coal is handled and shifted about, and not allowed to remain in the rain very long, is not the amount of the increase of weight rather insignificant?

A. It depends on the amount of rain; an inch of rain falling on coal increases the weight of that coal practically half of 1 per cent” (pp. 1958-9).

Robert Husband testified concerning piles of coal running from 10,000 to 30,000 tons, kept in stock for six months, stating that an overage would be experienced of from 2 to 3 per cent (p. 1963). If, however, the pile was put in the yard in the summer months and remained only about two or three months before the rain commenced, the increase would not be so great (p. 1966).

James J. McNamara, manager of the Central Coal Company, a company owned by the Western Fuel Company, testified that he had experienced overruns amounting to 3 or 4 per cent over the

custom-house weight (p. 1969). The reliability of this witness can be readily determined when we consider that he testified that the shortage upon the importation of Australian coal amounted to 4 per cent (pp. 1970-2). Upon learning that this statement was inconsistent with the record of discharges since the fire of 1906, he asserted that such was his experience 20 years ago (p. 1972).

It will be observed that in no instance do any of these witnesses attempt to touch either the general overage or any of the specific instances of overage resulting from that portion of the business conducted by the Western Fuel Company with which we are concerned. It should also be borne in mind that we have not before us the manner in which their business was being conducted.

RESPONSIBILITY OF DEFENDANT, JAMES B. SMITH.

While the evidence already referred to conclusively establishes the guilt of the defendant James B. Smith, his own testimony is instructive to this point.

That he kept himself constantly in touch with the manner in which the business was being conducted and all its details, was clearly shown.

“When I am in business I never miss a daily trip to the waterfront. I go there to keep myself informed as to what is going on around the bunkers and the plant in general, and to discuss with my subordinates the general condition of the business from day to day. I think

I could safely say that prior to this trial hardly a day elapsed without my going on top of the bunkers. Every cargo of coal discharged at our bunkers is visited by me. I go aboard the ships to see the condition and the character of the coal we are buying and paying for" (p. 2155).

* * *

"Mr. Mills, as well as all the other employees, send reports to my office. I receive reports from every department of the business. From six to eight such reports are turned into my office every day. I do not necessarily look at Mr. Mills' reports daily. I know that they are there if I wish to refer to them at any time. I have certainly, in looking at them, observed overruns in connection with the barges" (p. 2160).

And necessarily realizing that he was personally responsible for the acts and conduct of his subordinates, he states:

"I assume the responsibility for all my subordinates in the transaction and result of the business in general of the Western Fuel Company" (p. 2167).

Upon cross-examination this witness unconsciously gave recognition to the fact that the overage depended, if not altogether, to a very large extent upon the weigher. Said Mr. Smith:

"Q. You say that the principal cause of increase in the weight of the coal is water; that is a fact, is it?

A. No, I did not say that entirely.

Q. What is the principal cause of increase in the weight of coal stored in a coal yard?

A. Under what conditions?

Q. Under ordinary conditions.

A. Well, the conditions are entirely changeable.

Q. Well, say, in the summer-time, say from June to September?

A. What kind of coal?

Q. Bituminous coal, Canaimo coal?

A. *But who would do the weighing?*

Q. And then it makes all the difference in the world who does the weighing what the coal weighs, does it?

A. If you will give me the kind of a question I can answer—do I infer from your question, Mr. Sullivan, that the weighing shall be done under the supervision of the United States Government and the coal stored in our yard?

Q. In response to a question which I put to you, you said it makes a difference who does the weighing: What did you mean by that response?

A. I said it made a difference as to the weighing?

Q. Yes. Read what the witness said, Mr. Reporter.

(Record read by the reporter.)

A. I will qualify that Mr. Sullivan, by asking and by repeating my question: Am I to assume in that question that the weighing is done by United States Government officials as it is done there at the Folsom Street or any other bunker, over a scale? * * * ” (pp. 2196-7).

The manner in which this witness felt that he was justified in conducting the business of the Western Fuel Company is pictured by another portion of his cross-examination.

“Q. Do you remember the time the ‘Aztec’ was being loaded from the ‘Melrose,’ and that Chief Engineer Lindley, of the Pacific Mail

Steamship Company, complained of the quality of the coal?

A. No, sir.

Q. Don't you remember the occasion when the 'Aztec' was being loaded from the 'Melrose', and that the engineer complained about the quality of the coal that was being put into the 'Aztec' from the 'Melrose', and that upon the engineer making a complaint as to the quality of the coal that was being put into the ship 'Aztec', Eddie Powers had another barge brought in with the very same kind and quality of coal in it that was in the other barge, and that he made the engineer believe he was getting a better quality of coal, and that afterwards you met Powers and you made the remark to Eddie Powers: 'I always knew you would make a damn good man.'?

A. I don't remember it, Mr. Sullivan, but if you wish to assume it, I will say yes, and I thought he was a damn good man at one time, and I think if he had taken the advice of his superiors around our place he would be a damn good man today.

Q. And don't you know that you made that remark because he succeeded in getting discharged from the second barge the same kind of coal as the coal that had been condemned by the engineer of the 'Aztec' on the first barge?

A. If he did it, Mr. Sullivan, I would say he was a damn good man, yes, sir" (pp. 2206-7).

It is true that defendants and their witnesses denied many—not all—of the specific acts of fraud herein narrated, but the conflict thus created can avail defendants nought in this appellate tribunal. Upon this phase of the case, subject alone to review

in the court below by motion for a new trial, the jury's word is final. No useful or beneficial purpose would, therefore, be accomplished by commenting upon the remaining evidence offered by the defendants and not already alluded to, nor by pointing out how, on cross-examination, the effect of much of this evidence was destroyed.

This detailed review of the evidence and explanation of many of the exhibits introduced, has occupied much space and its reading by the court will consume much time. Considering the great length of the record, the many exhibits involved and the importance of the controversy to the parties, as well as the claim urged that no offense has been made out—a claim argued and presented with great earnestness and ability—we cannot help but feel that our labors may assist this court in rapidly reaching an intelligent understanding concerning the many angles of this bitterly contested controversy, to the end that exact justice may be done to all concerned.

Law of the Case.

I.

THE MAKING OF FALSE WEIGHTS AND FALSE AND FRAUDULENT RETURNS OF WEIGHTS ON IMPORTED COAL AND ON FOREIGN COAL FURNISHED AS FUEL TO AMERICAN REGISTERED VESSELS, FOREIGN BOUND, PURSUANT TO A CONSPIRACY TO DEFRAUD THE GOVERNMENT OUT OF IMPORT DUTIES AND TO OBTAIN A REFUND OF DUTIES CLAIMED TO HAVE BEEN PREVIOUSLY PAID, ARE WITHIN THE SCOPE AND PURPOSE OF THE INDICTMENT, EVEN THOUGH NOT THE RESULT OF THE FRAUDULENT OR WRONGFUL MANIPULATION OF THE SCALES AND WEIGHTS.

The first legal proposition urged by plaintiffs in error is that the Government failed to prove a conspiracy to defraud the United States Government out of import duties or moneys refunded upon draw-back claims, as the result of or to be accomplished by the *fraudulent manipulation of scales and weights maintained by defendants on the docks, wharves and barges of the Western Fuel Company*; and it is therefore claimed that even though the evidence be sufficient to establish a conspiracy to so defraud the Government by making false weights and false and fraudulent returns of weights, nevertheless, the judgment of the court below must be reversed, because of a variance between the conspiracy alleged and the conspiracy proven. This point is bottomed upon the contention that in the indictment it is alleged that the conspiracy was to defraud the Government *solely and exclusively* by the "fraudulent manipulation of scales and weights", to be, and which were maintained upon

the docks, wharves and barges of the Western Fuel Company; which language it is claimed is descriptive of the offense charged, and therefore must be proven as alleged.

The construction thus intended to be given to the indictment in the instant case is not only without justification, but the language used is not even susceptible of the meaning imputed to it, nor do any of the decisions cited by opposing counsel sustain the point raised, or the argument advanced. As purely a question of construction is involved, a mere reading of the indictment ought to suffice. Says the indictment:

“That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company, * * * and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, * * * by making and causing to be made *false weights and false and fraudulent returns of weights* of such cargoes and importations of coal, and by further *fraudulently weighing and causing to be weighed* by themselves and by the Pacific Mail Steamship Company, a corporation * * *, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vesels pro-

pelled by steam, and engaged in trade with foreign countries * * * and which ships or vessels were registered under the laws of the United States; and further to defraud the United States by making, and causing to be made, false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service * * *, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company * * *, scales and weights which were to be and were fraudulently manipulated by the defendants, to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, * * * and to further cause fraudulent affidavits and statements to be made by the defendants and by each of them, to the officers of the Government of the United States, * * * and to the Pacific Mail Steamship Company, a corporation, * * * for the purpose and to the end that said Pacific Mail Steamship Company should claim from the United States a greater rebate on the drawback of coal duties permitted * * *, than the true weight of said coal would permit said Pacific Mail Steamship Company to claim, or was due the said Pacific Mail Steamship Company.

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, *to be incorrectly measured and weighed*, to the end, and for the purpose, that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weights" (pp. 6-8).

We must confess that we are unable to comprehend, in view of the language quoted, how it can be seriously urged that the conspiracy alleged was to defraud the United States only by the "manipulation of scales and weights" or how it can be successfully claimed that the words relied on are descriptive of the offense charged.

The offense charged in the indictment is the conspiracy "to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company * * * and * * * out of a large portion of the duties due to the United States on divers ship loads and cargoes of coal so imported by said Western Fuel Company and other persons. * * * " The language quoted, describes the offense, and coupled with the allegation of an overt act, would be, in and of itself, without further elaboration, sufficient to inform the defendants to a common certainty, of the offense charged against them. The indictment then proceeds, and definitely and concisely, by apt and well chosen words, asserts that the Government was to be defrauded in the respects pointed out:

(a) "By making, and causing to be made, false weights, and false and fraudulent returns of weights";

(b) "By fraudulently weighing, and causing to be weighed, and reported to the United States, the weight of all importations of coal loaded from the

bunkers and barges of said Western Fuel Company for fuel" on American registered vessels;

(c) By making, and causing to be made, false returns, weights and entries of coal shipped and loaded on board transports and other Government ships;

(d) By causing fraudulent affidavits and statements to be made by the defendants to the officers of the Government of the United States, and to the Pacific Mail Steamship Company, so that the latter company could claim a greater rebate on the drawback of coal duties than was permitted; and

(e) By causing all coal weighed in or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed.

(f) By fraudulently manipulating the scales and weights so as to record the false weight desired.

The offense charged against the defendants is that of engaging in an unlawful and illegal conspiracy. The language "and to that end, and for the purpose of carrying out said conspiracy * * * to maintain on the docks, wharves and barges owned, operated, controlled and kept by said Western Fuel Company, and by the said defendants * * * scales and weights which were to be and were fraudulently manipulated by the defendants", cannot be construed to be descriptive of the conspiracy which is the offense alleged. Such an interpretation would do violence to the instrument itself, as well as to the

evident intention of the pleader. It was intended to be, and is but one of the various methods or means which the defendants might pursue to accomplish the purposes and objects of the conspiracy which is the gist and gravamen of the offense.

In fact the position taken by counsel for plaintiffs in error, if pushed to its final conclusion, is that the conspiracy alleged was to fraudulently manipulate the scales and weights, their language being:

“The gravamen then of the indictment is that the defendants conspired to manipulate fraudulently the scales as well in the weighing of the coal upon the docks, at the time of its importation, as in the weighing of the coal upon the barges at the time of its delivery to the draw-back steamships * * * ” (p. 16).

The only criticism which can be logically urged against the indictment is that it unnecessarily, and with greater particularity than was essential, attempts to point out the various means by which the conspirators intended to carry the conspiracy into effect, matters which, according to many decisions, some of which emanate from this very court, constitute no essential part of an indictment for conspiracy. The indictment in this case was framed under Section 5440 (Sect. 37 Criminal Code) of the Revised Statutes which provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy

shall be liable to a penalty of not more than \$10,000, or to imprisonment for not more than two years, or to a fine and imprisonment in the discretion of the court.”

The gist and gravamen of the offense is the *conspiracy*, that is, the unlawful, fraudulent and corrupt combination and agreement to defraud:

U. S. v. Benson, 70 Fed. 591;

Banrion & Mulkey v. U. S., 156 U. S. 464
(39 L. Ed. 494).

And it has been repeatedly held, although the point is but herein indirectly involved, that an indictment under Section 5440 of the Revised Statutes is sufficient if it alleges the character of the conspiracy in which the defendants engaged, describing it with sufficient particularity to inform the defendants of the charge made against them, and points out an overt act committed by one or more, in furtherance thereof.

U. S. v. Benson, 70 Fed. 591 (decided by this court),

was a conspiracy case in which it was claimed that the indictment was insufficient for the reason, among others, that the facts alleged were not sufficient to advise Benson of what particular offense he was called upon to meet. The lower court had discharged the defendant on habeas corpus because of the insufficiency of the indictment. From the order of discharge, the Government appealed. Judge Hawley, delivering the opinion of this court, in reversing the order of the court below, said:

“Is it necessary to allege that the defendants named in the indictment, or either of them, would profit by the conspiracy, *or to state the means by which the conspiracy was to be successfully carried out, or that any fraud was actually consummated, or that it should appear upon the face of the indictment in what particular manner the acts alleged to have been performed in pursuance of the unlawful agreement would tend to accomplish the object of the conspiracy?* What facts are necessary to be alleged in the indictment in order to constitute an offense punishable under the provisions of section 5440? It will be observed by reference to the language of this section that it embraces two separate and distinct offenses, viz: First, a conspiracy to commit an offense against the United States; second, a conspiracy to defraud the United States in any manner or for any purpose. It is made an essential element of these offenses that one or more of the alleged conspirators must have done some act to effect the object of the conspiracy. The facts alleged in the indictment must be considered with reference to the second offense above stated, to wit, a conspiracy to defraud the United States. * * * There are, of course, certain general rules, that are well settled, which apply to all indictments, and to these rules it will be necessary to refer.

At common law ‘conspiracy’ is defined to be the unlawful confederacy and agreement of two or more persons to do an unlawful act, or a lawful act by unlawful means. The conspiracy constituted the offense, and it was frequently held that it was unnecessary to state the particular means by which the government or party was to be defrauded; that the felonious intent being charged, the means to effect the fraud were matters of evidence for the consideration of the jury; nor was it necessary to aver any overt act. The gist of the offense was the

entering into the conspiracy. The bare combination and agreement constituted the crime. (Citing cases.)

But the national courts cannot resort to the common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define what are crimes, to fix their punishment, and to confer jurisdiction for their trial. (Citing cases.) We must therefore look elsewhere than to the common law for the test to be applied which will determine the validity of the indictment. Where the offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient to charge the defendant, in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute, without any further elaboration. To this general rule should be added the qualification that the description of the offense in the indictment must be accompanied by a statement of all the particulars essential to constitute the offense, and must be sufficient to inform the accused as to what he must be expected to meet at the trial. *U. S. v. Simmonds*, 96 U. S. 362; *U. S. v. Carll*, 105 U. S. 612; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144.

Keeping in sight these general principles we now come to the question as to what a conspiracy is and what facts are necessary to constitute the offense under the particular provisions of Section 5440 upon which the present indictment is based."

And, after defining "conspiracy" and referring to other decisions, the opinion proceeds:

“An indictment under Section 5440 which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient and it is not necessary to aver the means agreed on to effect the conspiracy. U. S. v. Demmee, 3 Woods, 50 Fed. Cas. No. 14,948; U. S. v. Goldman, 3 Woods, 192 Fed. Cas. No. 15,225; U. S. v. Dustin, 2 Bond, 332 Fed. Cas. No. 15011; U. S. v. Sanche 7 Fed. 715; U. S. v. Gordon, 22 Fed. 250; U. S. v. Adler, 49 Fed. 736; See, as to other offenses, U. S. v. Ulrici, 3 Dill. 535, Fed. Cas. No. 16594; U. S. v. Simmonds, 96 U. S. 360; U. S. v. Brittan, 107 U. S. 655, 661, 2 Sup. Ct. 512.

From the authorities we have cited and quoted from, it will be observed that the gist of the offense under the statute, as well as at common law, is the conspiracy. The cases quoted from and cited are principally decisions rendered in the respective circuits and have no binding force upon this court except such as may be found in the soundness of the reasons therein given. Our attention, however, has not been called to any decision of the supreme court which takes issue with the circuit courts as to the requirement of an indictment under the clause of Section 5440, declaring it to be a conspiracy for two or more persons to conspire to defraud the United States in any manner or for any purpose. On the other hand, there are decisions which substantially affirm the doctrines announced in the circuit court. Some of them have already been cited in the course of this opinion. In *Dealy v. U. S.* 152 U. S. 539, 14 Sup. Ct. 680, the question was as to the sufficiency of the indictment to sustain a conviction under Section 5440 for a conspiracy to defraud the United States of the title and possession of large tracts of land of great value by means of false, feigned, illegal and fictitious entries of said lands under the homestead laws

of the United States; the said lands being public lands of the United States, open to entry, etc. It was there, among other things, objected that the indictment did not allege any particular tract of land of which the defendants conspired to defraud the United States. Mr. Justice Brewer, in delivering the opinion of the court said:

‘It is true no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county and subject to homestead entry at the land office. *But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete, even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.*

* * * * *

Viewed from the standpoint of good pleading, the weakest point in the indictment is perhaps found in the descriptive words: ‘By the means and in the manner following: That is to say:’ But in answer to this, as well as to the further question whether it properly informs defendant Benson as to what he is accused of, we content ourselves by quoting the language of the supreme court in reply to like objections,

in *Potter v. U. S.*, 155 U. S. 438, 445, 15 Sup. Ct. 144, as follows:

‘It is generally true, as claimed, that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant and surely it cannot be claimed that unnecessary matter of description must be proved otherwise than as it is stated. While there is plausibility in the contention of counsel, yet we think it would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient, or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge.’

The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.”

The case of

Perrin v. United States, 169 Fed 17,

(also from this circuit), is likewise in point. In that case, Mr. Peter F. Dunne, one of the attorneys for plaintiffs in error, represented Perrin. Mr. A. P. Black, his present associate, represented the Government. The decision was by Morrow, Circuit Judge. There it was objected that the indictment was insufficient because its allegations were not clear and concise, and the purpose of the conspiracy was not sufficiently set forth. In holding

the indictment sufficient, notwithstanding these alleged defects, the learned judge stated:

“The indictment is unquestionably open to criticism but giving effect to all of its allegations, including the agreement between Benson and the plaintiff in error, set forth in the indictment, and construing these allegations, in view of the statutory provisions relating to the exchange of lands of the state within forest reservations of the United States for lands outside of these reservations, we think the crime of conspiracy is sufficiently charged; but the criticism is directed mainly to allegations of the first count relating to the means employed to carry the conspiracy into effect.

* * * * *

The gist of the offense is the unlawful combination. *Bannon and Mulkey v. U. S.* 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494. The unlawful combination is sufficiently charged in the indictment in the allegation that the defendants conspired together to ‘defraud the United States of the title to and possession of large tracts of land’ described in the indictment. *It is not necessary to aver the means employed to carry the unlawful combination into effect.* *United States v. Benson.* 70 Fed. 591; 17 C. C. A. 293. Having averred the use of such means as will clearly apprise the defendant of the offense of which he is charged, we think the allegations are sufficient.”

See, also,

Benson v. United States, 169 Fed. 31.

In

Mayes v. United States, 179 Fed. 610,

also from this circuit, the question as to whether it was essential to plead in an indictment the means

by which a conspiracy alleged was to be carried out, was directly presented. It was there held that where the conspiracy alleged was to defraud the United States, the means by which the conspiracy was to be carried into effect constituted no essential part of the indictment. In this case, the court, quotes from *Evans v. United States*, 153 U. S. 584; 38 L. Ed. 840, where it is said:

“While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove”

In

Jones v. United States, 179 Fed. 584,

a companion case to the one last cited, also from this circuit, at page 593, in passing upon objections to the indictment, the following language is used:

“The charge in the indictment is based upon Section 5440 of the Revised Statutes which provided:

‘If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable,’ etc.

In *Bannon and Mulkey v. United States*, 156 U. S. 464, 468, 15 Sup. Ct. 467, 469, (39 L. Ed.

494) the Supreme Court, in referring to this statute said:

‘At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. (Citing cases.) But this general form of indictment has not met with the approval of the courts in this country and in most of the states an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved.’

Aside from this statutory requirement, the rule is that an indictment for conspiracy, like any other indictment, is sufficient if the facts stated fairly and reasonably, inform the accused of the offense with which he is charged. (Citing cases.)

In *Cochran and Sayre v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704,) the Supreme Court, discussing the sufficiency of indictments, said:

‘The true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.’ ”

In

United States v. Shevlin, 212 Fed. 343,

where the defendants were charged with having engaged in a conspiracy to defraud the United States

out of customs duties, the court, in holding that the indictment was sufficient, although it did not allege the means by which it was carried out, said:

“The tenth ground of demurrer questions the sufficiency of the description of the manner or means by which the defendants intended or caused the foreign merchandise to be passed through the United States custom lines; the eleventh, that it does not sufficiently allege any criminal intent on the part of the defendants. The general purpose and scope of the conspiracy are clearly described in the indictment. *It is not necessary to allege the exact manner or means by which it is to be carried out.*
* * * ”

In

Williamson v. United States, 207 U. S. 425;
52 L. Ed. 278,

in stating what an indictment for conspiracy should contain, it is said:

“But in a charge of conspiracy, the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.”

To the same effect is

Crawford v. U. S., 212 U. S. 188; 53 L. Ed.
465-475.

Without quoting the language used in the decisions, we invite the court's attention to the following cases in which it is held that the indictment is sufficient if a conspiracy to defraud the United States in language sufficient to apprise the de-

fendant of the character of the offense with which he is charged, is set forth, and an overt act alleged, without the necessity of pleading the means by which the conspiracy is to be made effective.

United States v. Gordon, 22 Fed. 250;

United States v. White, 171 Fed. 775;

United States v. Stamatopoulous, 164 Fed. 525;

Commonwealth v. Hightower, 149 S. W. 971;

Dwinnell v. U. S., 186 Fed. 754;

Sect. 28, Vol. 5, Ruling C. L., p. 1081.

Applying the rule declared by the decisions cited, to the present case, the indictment would have been sufficient had it omitted all reference to the means by which the conspiracy was to have been carried out, or the unlawful and corrupt purpose of the indictment carried into effect, leaving intact that portion of the indictment in which the conspiracy is charged and the overt acts set forth. The remaining portion of the indictment might, therefore, be regarded as mere surplusage. But, even though it be assumed, for the purpose of the argument, that it was essential that the means by which the fraud was to be perpetrated was required to be pleaded, and because pleaded, proved, nevertheless if, as the indictment in this case points out, this fraud was to be committed by various methods, proof of one or more of such methods would be sufficient even though all were not established, and in such event, no claim can be successfully urged that

any variance exists between the proof and the pleading.

In

U. S. v. Cassidy, 67 Fed. 698, 707,

Judge Morrow, in charging a jury in a conspiracy case, used this language:

“This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used to put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.”

Donaldson v. U. S., 208 Fed. 4-7,

where, speaking of various overt acts alleged, it was said, by Circuit Judge Gilbert, speaking for this court:

“These were acts which tended to effect the object of the conspiracy and it was enough if one of the acts charged, was proven to have been done.”

In *Jones v. U. S.*, 179 Fed. 584-600, *supra*, the following is stated (p. 600; language of Judge Morrow):

“It is nevertheless contended that the court was in error in refusing to give the following instruction requested by the plaintiff in error:

‘If the jury believe from the evidence that the defendant Williamson was in a conspiracy, such as is described in the indictment, with Boggs or other persons not mentioned in the

indictment, and that the defendants Mays, Jones and Sorenson, or any of them, either with one another, or other persons not mentioned in the indictment were in a conspiracy, but that there was no common understanding or agreement between the two groups, but that each group was acting for itself and independent of the other, then you must find the defendant not guilty.'

That the court was correct in refusing this instruction was obvious. The Government was not required to establish every allegation contained in the indictment. It was not required to prove that all the overt acts alleged were committed, nor was it required to prove that all the defendants named in the indictment were engaged in the conspiracy. It was sufficient to constitute the conspiracy charged in the indictment, to show that there was a combination of two or more persons to defraud the United States, and that one or more of such parties did an act to effect the object of the conspiracy charged."

Ency. of Evidence, Vol. 3, p. 416;

U. S. v. Howell, 56 Fed. 21;

State v O'Neil, 33 Pac. (Kan.) 287;

State v. Hewes, 57 Pac. (Kan.) 959;

Commonwealth v. Meserve, 27 N. E. 999;

State v. Bledsoe, 47 Ark. 233;

Crane v. U. S., 162 U. S. 626; 40 L. Ed. 1097.

In

People v. Everest, 3 N. Y. S. 612-15, the proposition herein involved is well stated by Barker, P. J.

"It is contended by the learned counsel for the appellants that as the indictment charges an indivisible crime, consisting of many elements which are unified by the form of the

allegations, the prosecution cannot succeed without proving all the elements set out as constituting a crime. This argument fails to recognize the legal principle which has been already stated, that the gist of the offense consists in the agreement, which constitutes but a single act. The conspiracy is complete when the combination is perfected. It is never necessary for the people to prove all the allegations in the indictment, if those which are supported by the evidence constitute the crime charged therein. If the crime is set out with false circumstances, they may be rejected as not necessary to be proved. Mr. Phillips says it is a 'universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime; and illustrates the rule by saying, 'that, in an indictment for murder, the malice is but a circumstance in aggravation, and may be rejected, and the accused be convicted of manslaughter.' (Citing cases.) The true rule is stated in *Bork v. People* 91 N. Y. 13, viz:

'Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant to have committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the other.' See also, *People v. Davis*, 56 N. Y. 95."

In

Crain v. U. S., 162 U. S. 626; 40 L. Ed. 1097, it was claimed that the second count in the indictment was materially defective because it charged the commission of separate and distinct felonies. In holding that the indictment was sufficient, that

the count was not objectionable, and that proof that the defendant had committed the offense charged in only one of the ways alleged, would be sufficient to sustain a conviction, the court cited and analyzed a number of decisions, and then proceeded:

“We are of the opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorneys, orders, certificates, receipts or other writing. The statute was directed against certain defined modes for accomplishing a general object and declaring that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years, nor more than ten years, or by imprisonment for not more than five years, and a fine of not more than \$1,000. We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes, may not be charged in one count so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charged contained in a single count; for a judgment on a general verdict of guilty, upon that count, will be a bar to any further prosecution in respect of any of the matters embraced by it.”

It is likewise unnecessary to prove each of the various ways the Government might be defrauded by the conspiracy alleged, or what, if anything, was

in the minds of the conspirators as to the manner in which they intended to effectuate its objects.

Crawford v. U. S., 212 U. S. 188; 53 L. Ed. 469;

Deely v. U. S., 152 U. S. 539; 38 L. Ed. 535-6;

Hush v. U. S., 100 U. S.; 25 L. Ed. 539;

Hyde v. Shine, 199 U. S. 52; 50 L. Ed. 90.

LACK OF MERIT DEMONSTRATED.

That counsel representing plaintiffs in error did not themselves believe that there was any substance to the point here under consideration until it became necessary to urge it in an attempt to reverse the judgment of the lower court, must be obvious. If, as claimed by counsel, the only crime charged was a conspiracy to defraud the United States in the manner alleged, by a manipulation of scales and weights, and that proof that the fraud was to be perpetrated by some other method would not establish the offense charged, all evidence tending to establish that the Government was defrauded excepting by a manipulation of the scales and weights, was essentially immaterial. Yet, an examination of the record will disclose that no protest was voiced by any one of the numerous counsel representing plaintiffs in error in the court below, against the admission of such testimony. The record will also show that the lower court was not requested to give any instructions which would in-

vite the juror's attention to the legal proposition now being urged, or confine their deliberations to a consideration of only such evidence as may have been introduced, showing some physical interference with the scales and weights. In fact, the instructions requested by defendants—and they were all given by the court—gave recognition and assent to the argument here made by the Government.

POINT URGED CANNOT NOW BE CONSIDERED.

Upon a writ of error, the jurisdiction of this court is limited to a review of the errors alleged to have been committed by the trial court. No objection was made before that tribunal to the form or sufficiency of the indictment. In fact, its sufficiency is not here challenged. No objection was made to the introduction of evidence which it is now claimed, does not tend to establish the offense charged. No attempt was made by requested instructions, or by appropriate motions to strike out, to remove from the consideration of the jury, the evidence which conclusively demonstrates that the conspiracy charged was entered into, and the Government actually defrauded in pursuance thereof by many of the methods described in the indictment. The action of the lower court was never invoked, or attempted to be invoked, with a view to raise the question now being presented. Under such circumstances, the question is not now open for review.

Jones v. U. S., 179 Fed. 592, and cases there cited.

II.

**THE DISCRETION EXERCISED BY THE LOWER COURT IN
DENYING DEFENDANTS' MOTION FOR A NEW TRIAL, CAN-
NOT BE INTERFERED WITH.**

It is claimed by defendants in error that the lower court committed an abuse of discretion in denying their motion for a new trial, for which reason the judgment should be reversed.

In the argument advanced in support of this claim it is asserted that it was the duty of the lower court to have granted the new trial; first, because the evidence was entirely insufficient as matter of law to warrant the conviction of any of the defendants; and secondly, because of misconduct on the part of some of the jurors.

In support of their motion for a new trial defendants filed a number of affidavits, which are contained in the record. In passing upon this motion, the court considered not only the evidence introduced and the proceedings had upon the trial, but likewise all of the affidavits filed by both parties to be used upon the hearing of said motion. Under these circumstances, the order made by the lower court denying defendants' motion for a new trial, was the exercise of a discretion vested exclusively in the lower court, which, under the authorities, cannot be interfered with or reviewed upon writ of error. The rule as stated is given recognition by counsel for defendants. It is asserted, however, that there is a well-defined

exception to the rule, which permits the review of an order denying a new trial, where it results from an abuse of the discretion confided to the lower court. While there is an exception to the rule, it is not accurately defined by opposing counsel, nor is the argument advanced by them sustained by decisions of the federal courts.

If the trial judge refuses to hear, entertain or decide a motion which under the law he is required to hear, entertain and determine, or if through some mistaken view of the law he refuses to consider affidavits or other evidence properly offered in support of the motion for a new trial, then and then only can the appellate tribunal interfere. On the other hand, if the motion is entertained and is finally decided upon its merits, and all evidence and proofs offered are considered, the decision of the trial court upon such motion is final.

The proposition as stated is sustained by an unbroken line of decisions. In the case of

Mattox v. U. S., 146 U. S. 140, 153; 36 L. Ed. 917-921.

The lower court excluded certain affidavits offered in support of the motion for a new trial, in which it was attempted to show misconduct on the part of the jury, and then denied the motion. The affidavits excluded were of course not considered. Holding that under these circumstances the order

could be reviewed on writ of error, Mr. Chief Justice Fuller, speaking for the court, said:

“The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error (citing *Henderson v. Moore*, 9 U. S. 5 Cranch, 11; *Newcomb v. Wood*, 97 U. S. 581), but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved.”

And, after holding that the affidavits should have been admitted, the decision proceeds:

“These affidavits were within the rule, and being material, their exclusion constitutes reversible error.”

The distinction pointed out in the case last cited is pointedly shown by the case of

Felton v. Spiro, 78 Fed. 576.

In that case the judge of the lower court refused to grant a new trial, upon the ground that he had no power to set aside a verdict because it was against the weight of the evidence. This is made clear from the opinion rendered by the trial judge, a portion of which is set forth in the decision of the court of appeals. In reversing the order of the court below, Circuit Judge Taft, speaking for the court, said:

“The next, last, and chief assignment of error is based on the action of the trial court in refusing to exercise his discretion in respect

of the motion of the defendant to set aside the verdict because contrary to the weight of the evidence. The language and ruling of the court in passing upon the motion for a new trial is incorporated in the bill of exceptions.

* * * * *

The perusal of this opinion leaves no doubt in our minds that the learned judge intended to refuse, and did refuse, to consider or act upon the motion for a new trial, in so far as it was based on the ground that the verdict was against the weight of the evidence, because he was of opinion that the court had no power to set aside a verdict on such a ground.

* * * * *

A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of the jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, *it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so*, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error. In *Mattox v. U. S.*, 146 U. S. 140, it was held

that, where the trial court excluded affidavits offered in support of a motion for a new trial, and in passing upon the motion exercised no discretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the Supreme Court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court. This furnishes direct support for the view that the refusal of the trial court to consider at all as a ground for new trial that the verdict was contrary to the evidence may be assigned for error here," and the judgment was reversed with instructions to determine the motion for a new trial on its merits.

The same distinction was again pointed out in

Wells Fargo & Co. v. Zimmer, 186 Fed. 131,
133,

where it is said:

"Plaintiff in error cites and places reliance upon the case of *Mattox v. U. S.*, 146 U. S. 140. In that case the trial court excluded the affidavits offered in support of the motion for a new trial. The Supreme Court announced the rule of law as being that the allowance or refusal of a new trial rests in the sound discretion of the court, which cannot be made the subject of review by writ of error, but held that, as the trial court excluded the affidavits in support of the motion and did not consider them, the court in that respect committed an error and the action of the court in excluding the evidence offered in support of the motion for a new trial was subject to review.

In the case before us the court received the affidavits in evidence and based its ruling upon

full consideration thereof, and its judgment overruling the motion is not subject to review.”

In Dwyer v. U. S., 170 Fed. 160, 165,
the only ground upon which an appellate tribunal can interfere with an order denying a motion for a new trial is made clear. In that case the lower court refused to entertain the motion for a new trial at all. In reversing the judgment this court, through Judge Morrow, said:

“We are clearly of the opinion that the District Court sitting at Boise City had authority to pass upon the motion for a new trial in this case, and, as it appears that it was convenient for counsel on both sides to present the motion at that place and applied to the court to do so, it was the duty of the court to have heard and determined the motion on its merits.

It is an established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. (Citing cases.) But where the trial court excludes affidavits and exercises no discretion with respect to the matters therein stated, the action of the court is preserved by exception for review by the appellate court. (Citing *Mattox v. United States*, 146 U. S. 140, 147; *Ogden v. United States*, 112 Fed. 523, 525.)”

To the same effect see

Haws v. Victoria M. Co., 160 U. S. 311-314;
40 L. Ed. 439.

Higgins v. U. S., 185 Fed. 710-717.

James v. Evans, 149 Fed. 136.

Van Stone v. Stillwell, 142 U. S. 128-138;
35 L. Ed. 963.

Holder v. U. S., 150 U. S. 90-92; 37 L. Ed.
1010.

Gourdaine v. U. S., 154 Fed. 460.

Herman v. American Bridge Co., 167 Fed.
934.

Youtsey v. U. S., 97 Fed. 947.

Board v. Keene, 108 Fed. 516.

Newcomb v. Wood, 97 U. S. 581; 28 L. Ed.
1085.

Railroad Co. v. Horst, 93 U. S. 291; 23 L.
Ed. 898.

Ogden v. U. S., 112 Fed. 525.

Colt v. U. S., 190 Fed. 305-309.

Blitz v. U. S., 153 U. S. 308; 38 L. Ed. 725.

An examination of the authorities cited by plaintiffs in error to the point that the order denying a new trial can be reviewed under writ of error, will demonstrate that upon the record herein the point is destitute of merit.

**IF THE ORDER DENYING A NEW TRIAL WERE REVIEWABLE,
NEVERTHELESS THE AFFIDAVITS FAILED TO DISCLOSE
ANY REASON FOR INTERFERENCE BY THIS COURT.**

The principal claim urged by plaintiffs in error why the lower court should have granted a motion for a new trial, was because of the alleged misconduct of the jurors. An examination of the affidavits filed in support of this ground will disclose

that the alleged misconduct consisted: First, of the reading by some of the jurors of an article appearing in the Oakland Tribune; secondly, because of alleged statements made by two of the jurors assimilating the facts in this case to the sugar fraud cases; and thirdly, to the reading by the jurors of articles and editorials appearing during the trial in various of the San Francisco newspapers.

The article appearing in the Oakland Tribune (pp. 2300-2301) in no way, even remotely, alluded to the case on trial. Even though it be assumed that this article was read by some of the jurors, it would be impossible to conceive how it could create in their minds any prejudice against the defendants, or to any extent influence their judgment.

Considerable stress is laid upon the affidavit made by the juror William K. Beans, in which he states that Fred Becker handed to him

“to read a newspaper article referring to, or containing, a series of articles distinctly hostile to the defendants herein, commenting at some length in a manner adverse to their defense herein, and likening this case to the American Sugar Refining Company case in New York, in which some of that company’s officers or employees had been convicted for false weighing” (p. 2308).

It finally developed, however, that the newspaper article referred to was the one published in the Tribune, to which reference has already been made (affidavit of Fred Becker, pp. 2485-2487), and

that Mr. Beans was therefore mistaken in describing the newspaper turned over to him by Becker.

In the affidavits filed by the defendants there was also imputed to jurors Thomas E. Mahar and Fred Becker statements indicating that there was some similarity between the sugar fraud cases and the case on trial. That any such statements were made or any such language used was positively and emphatically denied by Mr. Mahar (pp. 2471-2473) as well as by Mr. Becker (pp. 2485-2489), and their testimony in this regard is corroborated by the affidavits of some of the other jurors (affidavit of R. H. Gatley, pp. 2473-2475; affidavit of L. P. Bolander, pp. 2477-2479).

These conflicting statements were unquestionably considered by the trial judge and resolved in favor of the Government.

That neither the reading of the article contained in the Oakland Tribune nor the reading by the jurors of any of the articles contained in the San Francisco newspapers published during the trial can be held to constitute such misconduct on the part of the jurors as to entitle the defendants to a new trial, is well settled.

Holt v. U. S., 54 L. Ed. 1022;

U. S. v. Reed, 12 How. 361; 13 L. Ed. 1023;

U. S. v. Francis, 144 Fed. 520;

U. S. v. Gilbert, 2 Sumn. (U. S.) 19;

People v. Leary, 105 Cal. 400;

People v. Field, 149 Cal. 464;

People v. Fernandez, 3 Cal. App. 689;
Fogarty v. State, 80 Ga. 450;
State v. Cucuel, 31 N. J. Law, 249;
Moore v. State, 36 Tex. Cr. Rep. 88;
Colt v. U. S., 190 Fed. 305; certiorari denied, 223 U. S. 729; 56 L. Ed. 633;
Mattox v. U. S., 146 U. S. 140; 36 L. Ed. 917.

In this connection it might also be well for us to direct the court's attention to the fact that but little, if anything, suggested by the numerous articles published from time to time in the San Francisco newspapers was inconsistent or in conflict with the facts disclosed by the evidence introduced in the presence of the jurors. But however this may be, the jurors having heard the evidence, of course knew whether the articles were true or false. If false, they could in no way have affected them. This case in this respect is no different to any other important case that is tried. Reports of evidence introduced are constantly published, and if mistrials are to result merely because the newspapers have been read by jurors, few convictions could be sustained unless the jurors were prevented from separating after the trial had actually commenced.

But aside from this, the defendants are not in a position to successfully assert that any prejudice resulted to them from the reading by the jurors of the articles published in the San Francisco newspapers during the trial.

Upon the hearing of the motion for a new trial the Government used the affidavit of W. H. Tidwell, in which he states:

“Upon a number of occasions during said trial, before court would convene, some of the jurors who had been impaneled to try and who were engaged in trying said action, read newspapers. Upon said occasion said jurors so reading said newspapers would be located in the corridor of the United States Postoffice Building, which was situated just outside of and which connected with the courtroom in which the sessions of said court were held. The fact that said jurors upon said occasions were so reading said newspapers was, of course, apparent to all persons passing through said corridor and into said courtroom at the time said jurors were so located in said corridor reading said newspapers” (p. 2483).

He then points out that when under examination touching their qualifications to act as jurors a number of the proposed jurors were questioned regarding the newspapers for which they subscribed and which they were in the habit of reading, and that he (Tidwell), during the trial, had read practically all of the newspaper articles contained in the affidavits. He then proceeds:

“Upon and according to my information and belief, the fact that said articles, items and editorials were so published in said respective newspapers was known by the defendants in this action, and by the various attorneys representing said defendants, on or about the date upon which each of said articles, items and editorials were so published in said respective newspapers. Upon and according to my in-

formation and belief, said defendants and their said attorneys knew, prior to the termination of the trial of said action, that all of said newspaper articles, items and editorials had been so published, and were familiar with the matters set forth in each of said articles, items and editorials.

At no time during the trial of the above-entitled action did any of the said defendants, or the attorneys for said defendants, or any of them, request the above-entitled court, or Honorable Maurice T. Dooling, judge therein presiding, to instruct, charge or admonish said jury not to read any item, article or editorial that might appear or be published in any newspaper regarding said action, or any of the issues involved therein, or any of the parties thereto, or any of the witnesses that were or might be called upon the trial of said action, or bearing or commenting upon the subject matter of said action; nor did said defendants, or any of them, or any of their counsel, at any time during said trial or at the conclusion thereof, request said court or said Hon. Maurice T. Dooling to instruct, charge or admonish said jury not to permit themselves to be influenced by any article, item or editorial that might have been printed in any newspaper, or that might have been read by them or called to their attention" (pp. 2484-5).

In view of these circumstances, the defendants waived any right they might have had by way of application for a new trial, to impute misconduct to the jurors, arising out of the reading of these newspaper articles.

Sheehan v. Hammond, 2 Cal. App. 371-4;

Zibbell v. S. P. Co., 160 Cal. 253;

Monaghan v. Rolling Mills Co., 81 Cal. 190;

Wood v. Moulton, 146 Cal. 317;

Doolin v. Omnibus Co., 140 Cal. 375.

III.

THE EVIDENCE CONCLUSIVELY ESTABLISHES THE GUILT OF ALL OF THE DEFENDANTS.

In its charge to the jury the lower court, among other things, said:

“But while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose or purposes alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose or purposes; the combination or common design or object may be regarded as proved if the jury believe from the evidence beyond a reasonable doubt that the defendants were actually pursuing in concert the unlawful object stated in the indictment, whether acting separately or together by common or different means; providing all were leading to the same unlawful result.

* * * * *

A conspiracy can seldom be proved by direct testimony. Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, the relation of these acts to each other, and their tendency, by united effect, to produce the common

result. In other words, where the jury finds that the acts of the several parties charged with conspiracy are the co-ordinates of each other, and are for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, they are at liberty to find that the various parties performing these several and respective acts were engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before the jury to show that such parties ever entered into any agreement to commit such offense.

A conspiracy may be proved by showing the acts and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must necessarily be circumstantial in character and it will be sufficient if it leads to the conviction that such conspiracy in fact existed. Thus if it be shown that the conspirators were apparently working to the same purpose—that is, one performing one part and another, another part, each tending to the attainment of the same object so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effect that object” (pp. 2279-2281).

That these instructions contained a clear and explicit exposition of the law bearing upon the subjects to which they related, is not challenged by counsel for plaintiffs in error. In fact, no criticism is made of either the whole or any part of the charge given by the court to the jury. That they correctly state the rules of law applicable to proof

of conspiracies, particularly in a case such as this, is not subject to debate.

Wharton on Criminal Law, Vol. 2 (10th Ed.),
Sec. 888, p. 1671.

Wharton on Criminal Law, Vol. 2 (11th Ed.),
Sec. 1665, p. 1822.

In

Marrash v. United States, 168 Fed. 225-229,
the court said:

“It is argued that there was no direct evidence of conspiracy, and the circumstantial evidence was insufficient to warrant a conviction. Under Section 5440 it was necessary to prove that two or more of the defendants, Selim Marrash and George Sara, for instance, conspired to defraud the United States of duties lawfully due on imported laces, and that either Marrash or Sara did enact and carry it out. It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine. It is enough that they have a common purpose to defraud and that they act together for that purpose.

It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common, unlawful design, apart from and unknown to the others. It is manifest, therefore, that in many and indeed in most cases of conspiracy a corrupt agreement is proved by circumstantial evidence. Such evidence must, of course, satisfy the jury beyond a reasonable doubt, but in this

respect there is no distinction between circumstantial and direct evidence.”

See also

Alkon v. United States, 163 Fed. 810-812;
People v. Sacramento Butchers' Ass'n., 12
 Cal. App. Rep. 471-495;
People v. Donnelly, 143 Cal. 394;
Thomas v. United States, 156 Fed. 897-910;
Davis v. United States, 107 Fed. 753;
Chadwick v. United States, 141 Fed. 225, 229-
 230.

Reading the evidence in the light of these authorities, how can it be said that the evidence does not show that the defendants were acting together understandingly to accomplish the purpose described in the indictment?

Without reiterating any of the evidence which is fresh in the mind of the court, we desire to briefly advert to some of the circumstances and facts which conclusively prove that in perpetrating the frauds alleged in the indictment the defendants were acting together pursuant to a common understanding and to effectuate the same purpose.

As to Plaintiff in Error, James B. Smith:

James B. Smith was the vice-president and active manager of the Western Fuel Company. He managed and directed its affairs and controlled its destinies. He assumed, as he was obliged to, full responsibility for the conduct and actions of his subordinates.

Shortly after the Folsom Street bunkers were acquired, the permanent decking or flooring was ripped up, putting them in the condition pictured by the evidence, so that the frauds charged with reference to incoming coal could be easily perpetrated. He knew the location of the scales-house, the position of the weigher and his resulting inability to observe operations; he knew not only the invoice weight of the various cargoes of coal discharged by the Western Fuel Company (because, in many instances, as the entries disclose, the cargoes were entered by him in the customs-house), but he likewise knew the actual weight of the cargoes loaded at Nanaimo and Northfield. He received daily reports of the quantity of coal discharged, and, at the conclusion of the removal of the cargo, knew whether it had weighed short or over, and the amount thereof. Visiting the docks daily, as he testified, intimately acquainted with the activities of all of his subordinates, and keeping himself in touch with every angle of the business done by the Western Fuel Company, he must have known of the practices indulged in to avoid the payment of duties upon imported coal, particularly in view of the shortages that occurred from time to time, representing the difference between the invoice and out-turn weights, and the greater shortage represented by the difference between the actual loading weight and out-turn weight. He kept himself daily informed as to the exact weight of the coal discharged into the compartments of the offshore

bunkers and the exact weight of the coal from time to time checked into and laden upon the barges. He knew each vessel into the bunkers of which this coal was delivered, the claimed weight of the coal thus supplied, and the overage from time to time reported as existing upon the barges. Receiving as he did, daily transcripts of the books kept by Mills, he had positive information as to the quantity of coal going into and being taken out of the barges, and when clean-ups occurred, knew not only the amount of overage but the quantity of overage in tonnage and the percentage it bore to the coal received by the barge. He knew, as everyone else knew—even the experts—that the overages shown by Mills's books and proved by the evidence, could not be accounted for other than by the existence of illegitimate and dishonest practices.

It was communicated to him that Bunker complained that the "Manchuria" was not receiving the quantity of coal claimed to have been supplied, but without avail. The overages resulting from the barges were shown up in the monthly statements, and when inventories were being prepared was the subject of conversations occurring between himself and Secretary Norcross. The value of the overages in money was contained in the annual statements prepared by President Howard and explained by him at the meetings of the stockholders. And, in a large percentage of cases, the affidavits upon which duties were refunded by the United States Govern-

ment were made by Smith, most of which, as the evidence shows, were false and unfounded.

In addition to these things, however, the evidence proved that with his consent and direction the gratuities donated to the employees and one of the officers of the Pacific Mail Steamship Company were made, and the illegal and unwarranted payments of overtime to the Government weighers were paid.

As to Plaintiff in Error, F. C. Mills:

Aside from being general manager of the Western Fuel Company and a member of its Board of Directors, directing the construction of the Folsom Street bunkers, and having knowledge of the monthly and annual statements, every fact and circumstance above narrated, knowledge of which was imputed to plaintiff in error James B. Smith, applies equally to F. C. Mills.

He was the superintendent in charge of the docks, bunkers and barges—that branch of the business of this corporation with which we are here concerned. All of the employees engaged in this branch of the service were subordinate to and controlled by him. As to him, however, the evidence showing a persistent and consistent course of conduct to accomplish the purpose stated in the indictment is more direct and more specific. We find him “howling” when barges turned out short; detailing David Powers to act as a tally clerk for the Pacific Mail Steamship Company, with in-

structions to give the Western Fuel Company the best of it; directing that coal furnished to the transports be shortweighted by overloading the tubs that were weighed and underloading those that were not weighed; refusing to pay heed or attention to the complaints of the engineers in charge of the liners coaled from the barges; directing said Powers to tend to his own business when referring to the overages on the barges; and finally, consistent with the illegal conduct proved, we find the perpetration of the fraud and its extent established by his own books.

As to Plaintiff in Error, E. H. Mayer:

That Mayer was a party to the conspiracy charged in the indictment, especially so far as duties upon imported coal were concerned, is unquestioned. He was the assistant weigher or tally clerk in charge of the operations resulting in the discharge of imported coal. It was Mayer who determined the destination of this coal after it had been weighed, and it was he who kept records, not only of the quantity of coal discharged daily, but the invoice weight, the out-turn weight, the shortage or overage, as the case might be, and the various portions of the cargo that were distributed in the bunkers and yards of the Western Fuel Company, including the pockets of the offshore bunker. It was he too who controlled the delivery of coal from the offshore bunkers to the barges, and kept records of the quantity thus discharged. It was this same plaintiff in error through whose instrumentality, direction

and command large quantities of coal were directly shoveled and dumped into the pockets of the in-shore bunker before being weighed, so that, among other things, the payment of customs duties would be evaded. It was the same defendant who interfered with the scales-rod and boasted of his actions, as he did of the shortweighing of coal due to the defective scales and the irregular link.

The activities of any one of these individuals without the assistance or consent of the others could not have reached any satisfactory conclusion. In the very nature of things, they must have acted in concert, the result of a preconceived common understanding, which had for its purpose the result portrayed in the indictment.

If Mayer and Mills are guilty, then James B. Smith must be guilty. And it is impossible to assume that subordinates would have committed the acts or indulged in the conduct established by the evidence as to the plaintiffs in error Smith and Mayer, without the knowledge, acquiescence and active participation of the superior by whom their activities were directly controlled.

IV.

THERE WAS NO MISCONDUCT ON THE PART OF COUNSEL FOR THE GOVERNMENT DURING THE COURSE OF THEIR ARGUMENT.

On page 329 of their brief, counsel for plaintiffs in error argue that counsel representing the Govern-

ment were guilty of misconduct in making the argument to the jury shown at Folios 2513-2520 and 2520-2530 of the record. An examination of the record, however, will disclose that no objection of any kind was made during the course of the argument, nor was it claimed in the court below that in using the language attributed to them, prosecuting counsel were guilty of any misconduct. It has been repeatedly held that even if objection is made to statements made during the course of an argument, unless the court is requested to instruct the jury to disregard the objectionable matter, so as to invite action on the part of the lower court, the alleged misconduct does not admit of review on writ of error or appeal.

Diggs v. U. S., 220 Fed. 556.

People v. Babcock, 160 Cal. 537.

People v. Molina, 126 Cal. 505.

People v. Shears, 133 Cal. 154.

People v. Regan, 36 Pac. 472.

State v. O'Keefe, 43 Pac. (Nev.) 918, 919.

People v. Warr, 22 Cal. App. 667.

In the case at bar not even an objection was made.

But even though the point urged could be considered, we feel satisfied that the court will reach the conclusion that no impropriety was indulged in.

In

Dunlop v. U. S., 165 U. S. 486, 41 L. Ed. 799,
the Supreme Court said:

“There is no doubt that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony and which are or may be prejudicial to the accused. In such cases, however, if the court interfere and counsel properly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.”

See also—

Chadwick v. U. S., 141 Fed. 225.

Johnson v. U. S., 154 Fed. 445.

Diggs v. United States, 220 Fed. 556.

People v. Conklin, 175 N. Y. 333,

where it is said:

“The prosecuting officer has a right to try his case in the same way and subject to the same rules as other counsel. It is only when he resorts to violent enunciations and to matters not embraced in the proofs or involved in the issues that the court may interfere.”

See also—

Holt v. U. S., 218 U. S. 245-254; 54 L. Ed. 1021-9.

People v. Burke, 18 Cal. App. 72.

People v. Ye Foo, 4 Cal. App. 742.

People v. Stein, 23 Cal. App. 108.

V.

**NO ERROR COMMITTED DURING THE CROSS-EXAMINATION
OF TIDWELL IN THE RESPECTS POINTED OUT.**

It is claimed that the court erred in sustaining the Government's objection to the following question put to Tidwell on cross-examination:

"Now, I ask you, what other matters have you in mind and which you use in that assumption other than these three instances of the 'Germanicus' and the 'Dumbarton'?" (p. 552).

The objection was that the question was not proper cross-examination. The witness was being cross-examined with reference to certain calculations and tables prepared by him, based upon invoices, entries, draw-back claims, books and records theretofore introduced in evidence. Aside from some observations made by him to which he had testified, he had no personal knowledge whatever touching the cause of the shortage of cargoes on importation.

Before the question quoted above was put to the witness he had testified that in his opinion the coal that went into the offshore bunkers had been correctly weighed, and his calculations made upon that basis, but that that assumption did not include all coal that passed over the scales, because he had information as to crooked weighing; that he had in mind the "Dumbarton" and the "Germanicus", where there was a shortage and where a settlement had been made with the Government on invoice weight (pp. 551-2).

What other matters he had in mind which created the opinion that all of the coal that went over the scales had not been weighed, was improper cross-examination. The evidence which follows emphasizes the objection. Says the witness:

“I did not prepare Table C necessarily on the assumption that all of the coal that went into the offshore bunkers went into the Folsom Street offshore bunkers. I simply treated the bunkers as bunkers according to the record” (p. 552).

Nor was any error committed in refusing to permit the following question to be put to the same witness, on cross-examination:

“Then, Mr. Tidwell, do you recall an article appearing in the ‘San Francisco Bulletin’ the day after you commenced this examination of the books and papers of the Western Fuel Company concerning these books and papers?” (p. 566).

That this was not proper cross-examination is obvious. How could the witness be affected by any article which appeared in a newspaper, unless it had been shown that the article emanated from him? The production of the newspaper article would not have proved that it originated from or that its publication was instigated by Tidwell. Especially is this true where as in this instance the record shows that Tidwell had already positively and emphatically denied that he had supplied any infor-

mation of any kind to any of the newspapers (pp. 556-7). Says Mr. Tidwell:

“I mean to be understood that I had absolutely nothing to do with the supplying of information to any newspaper, either directly, indirectly, or otherwise” (p. 557).

The subject-matter to which the question was directed, however, was thoroughly canvassed later on in the cross-examination of this witness (pp. 626-630).

VI.

NO ERROR COMMITTED IN RULING ON THE TESTIMONY OF FREUND.

During his direct examination the witness Arnold H. Freund had testified that upon one occasion he weighed a barge out short, which was evidently the result of watching the tubs very closely. The following question was then put to the witness:

“What, if anything, occurred after you had completed weighing out that barge; when did you next get an assignment to weigh drawback coal?”

A. Some time after.”

Then follows the question to which objection was made, viz.:

“How much time elapsed, if you can recall?”

To which the witness answered:

“I don’t know, but some few months as far as I can recollect. It was quite a while; I don’t recollect the date of it, but I know I didn’t get down there for some time after” (pp. 1182-3).

Preliminarily, it may be observed that the ground upon which the objection proceeded was not pointed out, the objection being:

“Mr. McCUTCHEN. We object to that. What is the inference to be drawn from that?”

The question, in any event, was proper as having a tendency to show collusion between the Western Fuel Company and the United States weigher, particularly considering the evidence introduced showing gratuities of coal and payments of alleged overtime. It was also pertinent for the purpose of showing when the witness was next engaged in weighing draw-back coal. However, the court may view this situation, no prejudicial error arose.

VII.

THE LOWER COURT COMMITTED NO ERROR DURING THE EXAMINATION OF TIDWELL AS A WITNESS FOR THE DEFENSE.

Evidently for the purpose of impeaching David G. Powers, the defendant put Tidwell upon the stand, who denied having had any conversation with Powers in which he (Tidwell) stated that in the sugar fraud cases the discharged checker and special agent in charge received the sum of \$100,000. In fact, the witness went further than that, and stated that he had not discussed the sugar case with Mr. Powers, but had discussed with him the matter of reward and had showed him the statute (pp. 2076-7). The witness was then finally asked the question:

“Have you had any correspondence with respect to reward?”

This question was so obviously improper that before counsel for the Government had an opportunity to object the court itself interposed by stating:

“This is not impeaching, Mr. Moore; this is not anything except fishing.”

The examining counsel himself realized the propriety of the court's remark by not taking an exception nor making a protest against this ruling. That Powers could not have been impeached by any correspondence passing between the witness and others, must be conceded. That defendants would have no right to impeach their own witness is equally obvious.

VIII.

NO ERROR WAS COMMITTED DURING THE EXAMINATION OF THE DEFENDANT MILLS.

During the direct examination Mills was asked the question:

“Now, Mr. Mills, the public accountant examining these books of yours, states that there is an average overrun on those barges during the entire year under investigation here of 4.88 per cent; I want to ask you whether it is possible for one of those barges to overrun 20, or 30, or 40 per cent?” (p. 2103).

The objection was that it called for the conclusion of the witness; that it was indefinite as to founda-

tion, and that it was not one which endeavored to elicit any facts from the witness (pp. 210-304).

The question was clearly objectionable upon the grounds stated. Aside from this, however, by the next question put to the witness, which was answered, the desired information was elicited (p. 2104).

It is respectfully, but earnestly, submitted that as the verdict of the jury is abundantly supported by the evidence, and the record is free from error, the judgment of the lower court should be affirmed.

Dated, San Francisco,
November 8, 1915.

MATT I. SULLIVAN,
THEO. J. ROCHE,
Special Assistants to the Attorney General.



U. S. Exhibit 4



U. S. Exhibit 5



U. S. Exhibit 9



U. S. Exhibit 13



U. S. Exhibit 16



U. S. Exhibit 17



U. S. Exhibit 18



U. S. + 159

5-233.
Smith & Co.
Jan 27/14
James Knell.

Case No. 2576
U. S. Circuit Court of Appeals
For the Ninth Circuit

Exhibit 159
Received Filed Feb 4, 1915
P. D. MARCHANT, Clerk









U.S.
Rel.
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Case No. 2-111
U. S. Circuit Court of Appeals
for the Sixth Circuit
Defendants submit _____
Received Sept 11 1904
H. D. MANUFACTURING, Clerk



Defendant's Exhibit "D"



Defendant's Exhibit "G"

Defendant's Exhibit "H"

